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REASONS FOR GRANTING THE WRIT

"Standing to Sue"

The District Court, and probably the Court of Appeals, held that one [Katz] who has been registered, examined, and classified under the Act, and who is currently in the National Guard and still registered under the Act, and who will continue to be so registered even after he leaves the National Guard, has no "standing" to commence a 28 U.S.C. §§ 2282, 2284 action to test the Act's constitutionality. The Court said:

> "Since Katz has not shown that he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of the UMTSA, he has no standing to press his claim in the sense that he presents no clearly existing claim or controversy for adjudication by this Court. See United Public Workers v. Mitchell, 330 U.S. 75 (1947); Cramp v. Board of Public Instructions, 368 U.S. 278 (1961)" (R-17).

The District Court, and probably the Court of Appeals, also held that one [Baumann] who has actually received an induction notice may have "standing," but:

> "[S]ince Baumann is within the jurisdiction of the military, the claims he makes in the complaint [brought when he was still a civilian] do not present a claim or controversy of which this court has jurisdiction. In other words, because of Baumann's change from civilian to military status, it can be

said that, as to him, this action has abated or that he lacks requisite standing to prosecute this litigation " (R-17). (Emphasis added.)

"Because of Bauman's change in status from civilian to military, he presently must be considered a party who is challenging the right of the Army to retain him in custody. Accordingly, Baumann's remedy is by way of an application for a writ of habeas corpus. See Witmer v. United States, 348 U.S. 375 (1955); United States ex rel. Goodman v. Hearn, 153 F.2d 186 (5th Cir. 1946); see also Falbo v. United States, 320 U.S. 549 (1954); Billings v. Truesdell, 321 U.S. 542 (1944); United States ex rel. Albertson v. Truman, 103 F. Supp. 617 (D.C. D.C. 1951)."

The decisions of the Courts below as to both petitioners' "standing"— and that Baumann's action abated, relegating him to habeas corpus—are in direct conflict with prior decisions of this Court.*

In Truax v. Raich, 239 U.S. 33, Pierce v. Society of Sisters, 268 U.S. 510, Barrows v. Jackson, 346 U.S. 249; Zorach v. Clauson, 343 U.S. 306; Adler v. Board of Education, 342 U.S. 485; Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77; Hanson v. Denckla, 357 U.S. 235, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449; NAACP v. Button, 371 U.S. 415 and Griswold v. Connecticut, 381 U.S. 479, to mention only a few of the outstanding cases, this Court recognized that standing to sue was possessed by people

* As to "standing to sue" generally, see note entitled "The Supreme Court and Standing to Sue", 34 N.Y.U. Law Rev. 141, written by counsel for petitioners here.

to vindicate the rights of others, and by people who had not yet actually been touched by the enactment. How much clearer, then, is the standing of petitoners here?

As to Katz, who had been forced (by threat of induction) into the National Guard (where he had or will have 300 nights of training, five months of active duty and twelve weeks of summer camp), the District Court relied only on Mitchell and Cramp, supra. In the former, the union members had not yet been touched by the Hatch Act—Katz has been touched by the Draft Act. (Moreover, because of cases after Mitchell, such as Adler, supra, it is dubious whether the "walk the plank" philosophy of Mitchell is viable today.) In the latter, which supports Katz's position here, Cramp was held to have standing to seek a declaration as to the constitutionality of a loyalty oath because "there can be no doubt that enforcement of the state law would inflict a direct and serious injury upon [Cramp]" (368 U.S. at 283).

As to Baumann, the Courts below relied only on five "classification" cases where registrants/draftees were seeking to review administrative action by the Selective Service System. Not one case dealt with standing to challenge the very constitutional existence of the Act itself. As to the "abatement" theory, there is not a single case cited in support, and there has never been such a case in this Court, or anywhere else. On the contrary, there is a long line of cases in this Court expressly authorizing the use of 28 U.S.C. §§ 2281, 2282, 2284 to test the constitutionality of statutes. (See, for example, Idlewild Bon Voyage Liquor Corporation v. Epstein, 370 U.S. 713; Zemel v. Rusk, 381 U.S. 1, Stratton v. St. Louis Southwestern Ry. Co., 282 U.S. 10.)

Moreover, Civil Rule 57 provides that "the existance of another adequate remedy does not preclude a judgment for declaratory relief [which, inter alia, Baumann seeks here] where it is appropriate."

The conflict as to the petitioners' standing between the Courts' decision below, and the prior decisions of this Court, is therefore quite clear. It is apparent that the Courts below failed to apply the standards of this Court for standing to sue, and that the result was to deny petitioners an opportunity to be heard on an issue which is of enormous importance, not only for themselves, but for hundreds of thousands of other young Americans as well.

In addition, this Court knows only too well the great importance of the liberal standing doctrine which it has fashioned over the years, and how through its manipulation and misapplication by lower courts, important constitutional rights can be, and have been, denied.

If allowed to remain, the decisions of the Courts below will stand as a blatant and inexplicable contradiction to a tremendously important and hitherto consistent procedural policy of this Court—a policy which has proved to be essential to the protection of rights.

Substantial Constitutional Questions

In General

The District Court disagreed with petitioners' contention that substantial constitutional questions were presented by the Ninth Amendment and Nuremberg Charter challenges to the Act, and each Court below refused to convene a three-judge court.

By their refusal, the District and Circuit Courts wholly ignored and acted contrary to the cases in this Court which have established the standard of substantiality necessary for the convening of three-judge courts.

Such cases (and their predecessors) as Ex Parte Poresky, 290 U.S. 30, California Water Service Co. v. City of Redding, 304 U.S. 252; Bailey v. Patterson, 369 U.S. 31; Idlewild Bon Voyage Liquor Corp. v. Epstein, supra, and Zemel v. Rusk, supra, have made clear the two tests of substantiality: (1) whether a question is foreclosed by a prior decision of this Court, and (2) whether a question is "obviously without merit," "legally non-existent," or "essentially frivolous."

Are the Questions Foreclosed?

Neither expressly nor impliedly have the questions raised below by the Ninth Amendment and the Nuremberg Charter even been dealt with by this Court, much less foreclosed. In its finding of insubstantiality, the District Court held:

> "...that the power of Congress to provide for involuntary conscription [sic] has been upheld on numerous occasions. United States v. Nugent, 346 U.S. 1 (1953); Etcheverry v. United States, 320 F.2d 873 (9th Cir. 1963); United States v. Miller, 233 F.2d 171 (2nd Cir. 1956); United States v. Kime, 188 F.2d 677 (7th Cir. 1951); United States v. Henderson, 180 F.2d 711 (7th Cir. 1956). The Court in United States v. Nugent said, 'the Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of

> military service on all physically fit young men. It is a valid exercise of the war power 346 U.S. at 9" (8a). (Emphasis added.)

The District Court was in error. Moreover, not one of the few cases it cited can withstand close scrutiny.

In Nugent, the only Supreme Court case cited by the District Court, no attack whatsoever was made on the Act's constitutionality. It involved the procedural due process aspects of processing a conscientious objector claim. "The power of Congress to provide for involuntary conscription" was in no way before this Court, and the Nugent quotation utilized by the District Court was obvious dictum. Moreover, no Ninth Amendment or Nuremberg Charter challenges were made.

Henderson is inapplicable because there Quakers conceded the power of Congress to conscript in time of war, and because they relied on the First Amendment (religion) only.

Kime was like Henderson, on which the Seventh Circuit relied.

Miller, a criminal case involving counseling non-compliance with the Act, was defended on First Amendment (speech) grounds only.

Etcheverry involved Fifth (due process) and First (religion) Amendment challenges to peacetime conscription.

It is no accident that the District Court could not adduce even a single case where the Act

successfully withstood a Ninth Amendment and/or Nuremberg Charter/Supremacy Clause attack. There is no such case, and this fact means that the questions raised below were not foreclosed. No other view is possible.

If a First Amendment (speech and press) attack was made unsuccessfully by the New York Times on a New York State law which heavily taxed newspapers only in New York City, surely no one would argue that a subsequent attack on equal protection grounds by the New York Post was "foreclosed." Or, if a First Amendment (assembly/petition) attack was made unsuccessfully by some persons on a Louisiana law which made it unlawful for only negroes to meet for political purposes in groups larger than ten, surely no one would argue that a subsequent attack by others on equal protection grounds was "foreclosed."

That is exactly the situation here. Although conscription has been passed upon by this Court (Selective Draft Law Cases, 245 U.S. 366), it was never passed upon here or anywhere else as against the challenges made here. Nor is the Ninth Amendment challenge precluded by a specifically delegated Congressional power to conscript. As a matter of fact, in the Selective Draft Law Cases, this Court never decided that Congress had such a power. While the conscription power was raised (although not vis-a-vis the Ninth Amendment or the Nuremberg Charter), this Court held only that Congress' delegated power was to declare war, provide for the common defense and raise and support armies. From there it went on to hold that this delegated power could be implemented by conscription. Thus, to the extent conscription was approved by this Court against challenges different from those

made here) it was not as a delegated constitutional power, but only as a means of implementing that power. As a means, particularly as against the Ninth Amendment and Nuremberg Charter, conscription is constitutionally infirm. It does rests on a false alternative that the government must either draft men or do without an army. There are several other ways to "raise" an army, although they will not be discussed here, but conscription is constitutionally not one of them. Article I, § 8, of the Constitution gives Congress the power to build post-offices. It surely does not follow from that "delegation" that Congress could conscript men to construct post-offices, work in them, and deliver the mail. Yet, that is just what conscription does in an effort to "raise" armies.

Therefore, the questions are not "foreclosed", and the decisions of the courts below severely conflict with this Court's precedents.

Are the Questions "Obviously Without Merit"?

The Ninth Amendment

The Courts below also held — without citing a single case — that the constitutional questions raised by petitioners' Ninth Amendment and Nuremberg Charter/Supremacy Clause challenges to the Act were "obviously without merit." While the District Court appeared to totally misunderstand petitioners' arguments, and while the Circuit Court seemed to merely affirm without opinion the District Court's mistakes and failure or refusal to meet the issue, the reasons why the Ninth Amendment is not only a valid — but a vital and unique — challenge to the Draft are not difficult to understand.

In No. 84 of The Federalist, Alexander Hamilton argued against a Bill of Rights because "men

American; this was the foundation upon which the Founding Fathers built the Constitution.

What was explicit in the Declaration of Independence, was implicit, but nonetheless binding, in the Constitution. The bridge from the former to the latter, the means by which the principles of the Declaration were constitutionally implemented, was the Ninth Amendment. The right to life, liberty, the pursuit of happiness — these were retained by the people.* Any argument to the contrary necessarily makes a mockery of the first eight amendments of the Bill of Rights. Of what use is freedom of speech or a free press to men who live and act by permission rather than by right? Of what use are the procedural safeguards which prevent the state from depriving an alleged lawbreaker of life or liberty without due process of law if, under the Ninth Amendment, his overall right to life and liberty are not recognized?

Yet the District Court was not disturbed by such a contradiction, partly because it was obviously pre-occupied with creating a strawman out of the totally inapplicable Fifth Amendment, partly because it recognized — albeit briefly — a substantial issue in this case. But instead of

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* The Court's attention is directed to Appendices, C, D, E and F, infra, where counsel have set forth in their entirety the lectures and three essays by contemporary philosopher-novelist Ayn Rand. Miss Rand's writing is the clearest presentation of the moral basis of individual rights and of the moral philosophy implicit in the Declaration of Independence and the Constitution. The material is set forth in this petition because it proves the moral/political principles upon which this case rests in its legal effort to vindicate them.

Miss Rand's lectures and three essays are found in The Virtue of Selfishness, New American Library, New York, 1965).

convening a three-judge court, it took a position on that substantial issue and then proceeded to dismiss the complaint; it rejected the Ninth Amendment challenge to the Draft, based on man's right to his own life, in favor of "responsibilities to our country." While it is incumbent upon every citizen to recognize certain obligations to his country, such obligations cannot take precedence over, or be at the expense of, fundamental rights. This issue is precisely what makes this case meritorious: what lies behind this historically unique and vitally important challenge to the Draft — through the Ninth Amendment — is the clash between collectivism and individual rights; between the tyranny of government (whether monarchy, as in the days of the Founding Fathers, or the welfare state of today) and zones of privacy which are beyond the reach of the state. It is against this clash that conscription must, and will, be measured if this Court recognizes the substantiality of the issue raised by this case and orders the Court below to convene a three-judge court to consider the merits. Let our courts decide once and for all on what ethical/political base they deem the Founding Fathers to have fashioned a nation. Whatever their decision, it will substantially affect any and every case in America where individual rights are at stake.

The Nuremberg Charter

Also wholly in conflict with this Court's precedents are the holdings of the Courts below that the questions raised by the Nuremberg Charter/Supremacy Clause challenges to the Act are "obviously without merit."

For one thing, since no decision of this Court

has yet reached the question of whether the principle of Article Eight invalidates conscription, and since therefore the issue has not been foreclosed, it cannot be "obviously without merit."

Via the Supremacy Clause, Article Eight of the Nuremberg Charter (59 Stat. 1546) is supreme law in the United States (United States v. Pink, 315 U.S. 203; Oyama v. California, 332 U.S. 633; Clark v. Allen, 331 U.S. 503; United States v. Schooner Peggy, 1 Cranch 103; Foster v. Neilson, 2 Pet. 253; Strother v. Lucas, 12 Pet. 410; Edye v. Robertson (Head Money Cases), 112 U.S. 580; United States v. Rauscher, 119 U.S. 407; Barcardi Corp. v. Domenech, 311 U.S. 150).

The principle of Article Eight reaffirmed the international juridical principle that one is obliged to make a moral choice when it comes to participating in his country's military adventures, and that if he makes the wrong choice it is no defense that he acted under orders (see 6 F.R.D. 69, 111 and Herbert Wechsler, Principles, Politics and Fundamental Law, Harvard University Press, 1961).

A dilemma is thus created by the principle of Article Eight, which requires one to make a moral choice as to what wars he will fight, and by the Draft Act, which coercively denies such a choice by forcing a man into the army. In other words, the situation is thus created of: "damned if you do, and damned if you don't." To require on the one hand, in the shadow of the noose, that a man stand up against the rest and say "this is wrong, and I will not go along with it," but on the other hand to force him at gun-point to go along with it, is to destroy choice and to thus make morality impossible.

It is the question raised by this blatant contradiction between the Nuremberg Treaty, a "supreme law of the land," and an Act of Congress that the two Courts below deemed "obviously without merit."

The District Court swiftly disposed of petitioners' Nuremberg argument by observing that there are three kinds of war crimes and that we have not tried to show that the United States is committing any of them, or that we have commanded any of our citizens to do so — thereby completely missing the whole point of our contention, and losing sight of the principle involved.

Precedent and Importance

It is unnecessary to go into detail here as to all those cases where the convening of a three-judge court was deemed necessary — a sampling of just three will suffice.

A three-judge court was held necessary to ascertain if New York's prohibition of selling bottled wines and liquor at Idlewild Airport for delivery overseas violated the Commerce, Import-Export and Supremacy Clauses (Idlewild Bon Voyage Liquor Corp. v. Epstein, supra).

A three-judge court was properly convened to ascertain if the Secretary of State was statutorily authorized to refuse to validate passports of United States citizens for travel to Cuba (Zemel v. Rusk, supra).

A three-judge court was held necessary to ascertain if an Illinois statute levying a franchise tax violated the Commerce, Due Process and

Equal Protection clauses (Stratton v. St. Louis Southwestern Ry. Co., supra).

Can a three-judge court be deemed necessary to look into travel, liquor sales and franchise taxes, but unnecessary when the personal liberty and very lives of untold numbers of Americans are at stake, and when the question for decision is whether the Ninth Amendment or federal force will decide how America will solve her military manpower problem — whether, under Article Eight of the Charter, men will or will not be allowed to make a moral choice about participating in the holocaust of war?

Counsel need not elaborate to this Court about the battle raging in America today over conscription. If ever there was an issue of burning public importance, conscription is that issue. If ever there was a time to resolve an issue, now is that time.

Mandamus

As stated above, it is not clear whether the Second Circuit made its decision solely on the basis that mandamus was an inappropriate method of reviewing a District Court's refusal to convene a three-judge court.*

If it did, a serious conflict would have been created with this Court's decision in Idlewild Bon Voyage Liquor Corporation, supra, where the same Second Circuit was admonished that it

* Inexplicably, in the Court of Appeals the government chose to argue only the mandamus point (R-27), informing the Bench on oral argument that, on the merits, the United States stood on the District Court Opinion.

could and should deal with single-judge refusals to convene three-judge courts. Moreover, a conflict would also exist with such cases as Reed Enterprises v. Corcoran, 354 F.2d 519 (C.A., D.C. 1965), which have followed Idlewild.

Counsel surely does not have to remind this Court how troublesome has been the issue of how to review a single-judge's refusal to convene a three-judge court, nor how significant was this Court's decision in Idlewild. Finally it seemed that the Court had approved procedural machinery to review such refusals, and that the long-standing question of where to go, and how, had been resolved.

The Congressional purpose in enacting the three-judge court provisions is well-known and will not be gone into here. Suffice it to say that to the extent courts, litigants, and counsel are unsure of where to go to review denials of three-judge courts, to the extent that the most recent decision of this Court on the subject is undermined by the very Circuit from which that decision came, to that extent the Congressional purpose is being thwarted, to that extent there is a very serious conflict, and to that extent this Court should review and correct the situation.

Thus, if the Circuit Court held that mandamus was an inappropriate remedy, certiorari should be granted.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 1, 1967

APPENDIX A

Statutes

1. 28 U.S.C. § 2282: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

2. 28 U.S.C. § 2284: "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court... shall be as follows...."

3. Universal Military Training and Service Act: "Sec. 4(a). Training and Service in general— ...every male citizen of the United States... shall be liable for training and service in the Armed Forces of the United States...."

4. Article Eight of the Charter of the International Military Tribunal (6 F.R.D. 69, 110): "The fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment."

5. The Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

6. The Supremacy Clause (Article VI): "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Appendix B-1. Opinion of District Court

TYLER, D.J.

Plaintiffs, Howard Katz and David Baumann, seek to have this court convene a three-judge district court pursuant to 28 U.S.C. §§ 2282, 2284. They contend that the Universal Military Training and Service Act of 1948, 50 U.S.C. App. §§ 451-473 (hereinafter referred to as "UMTSA") is unconstitutional and seek a declaratory judgment to that effect. Also, they have applied for injunctive relief against enforcement of UMTSA by the President, the Secretary of Defense and the Director of the Selective Service System.

To prevent the improvident granting of injunctions by a single judge against the enforcement of a federal enactment,[1] Congress has provided that an injunction, interlocutory or permanent, restraining the enforcement of a federal statute on the ground of unconstitutionality may be granted or denied only by a district court composed of three judges,[2] and that direct appeal lies to the Supreme Court from such a decision.[3]

In hearing an application for convention of a statutory three-judge court, the power of a single district judge is limited to the threshold or jurisdictional inquiries of "whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge

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[1] See 42 Cong. Rec. 4846 (1908) and 45 Cong. Rec. 7252 (1910).

[2] Judiciary Act of 1911, ch. 231, sec. 266, 36 Stat. 1162 (28 U.S.C. sec. 2282, 2284 (1958).

[3] Judiciary Act of 1911, ch. 231, sec. 226, 36 Stat. 1162 (28 U.S.C. sec. 1253 (1958).

statute." Lilliewild Bus Verenigde Liquor Corp. v. Duncan, 276 U.S. 713, 715 (1928); see also Ex parte Poresky, 290 U.S. 30 (1933); Bell v. Waterfront Comm'n, 278 F.2d 653 (2d Cir. 1960); Stuart v. Wilson, 262 F.2d 539 (5th Cir. 1958).

Despite allegations of federal jurisdiction based erroneously on other statutes in their complaint, plaintiffs in their briefs rest jurisdiction of their claims upon 28 U.S.C. §1331, which confers upon the district courts jurisdiction of "All civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States." Since plaintiffs are directly attacking the constitutionality of an act of Congress, there is no doubt but that the controversy is one which arises under the Constitution and laws of the United States. Further, it will be assumed arguendo that the jurisdictional amount, $10,000, is sufficiently satisfied. See, generally, Glenwood Light and Water Company v. Mutual Light, Heat and Power Company, 239 U.S. 121, 125 (1915). The next inquiry in the context of jurisdictional requirements is whether plaintiffs have the requisite "standing" to press their claims. See Tileston v. Ullman, 318 U.S. 44 (1943). A party invoking the powers of a court to hold a statute unconstitutional must show not only that the statute is invalid but also that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement. Barrows v. Jackson, 346 U.S. 249 (1953), reh. den. 346 U.S. 841 (1953). Doremus v. Board of Education, 342 U.S. 429 (1952).

One of the plaintiffs, David Baumann, is presently on active duty in the United States Army and is stationed at the United States Army Training Center, Fort Sill, Oklahoma. On the date this action was commenced, February 23, 1966, Baumann was not in the armed forces. He was inducted a few days later on March 1, 1966. Consequently, Baumann is now subject to the jurisdiction and control of the United States Army. Because of Baumann's change in status from civilian to military, he presently must be considered a party who is challenging the right of the Army to retain him in custody. Accordingly, Bauman's remedy is by way of an application for a writ of habeas corpus. See Witmer v. United States, 348 U.S. 375 (1955); United States ex rel. Goodman v. Hearn, 153 F.2d 186 (5th Cir. 1946); see also Pallo v. United States, 320 U.S. 549 (1944); Billings v. Truesdell, 321 U.S. 542 (1944); United States ex rel. Albertson v. Truman, 103 F. Supp. 617 (D.C.D.C. 1951). Since Baumann is within the jurisdiction of the military, the claims he makes in the complaint do not present a claim or controversy of which this court has jurisdiction. In other words, because of Baumann's change from civilian to military status, it can be said that, as to him, this action has abated or that he lacks requisite standing to prosecute this litigation.

The other plaintiff, Howard Katz, currently resides in New York City. On October 3, 1963, his local draft board ordered him to report for induction on October 18, 1963. Katz, however, enlisted in the Rhode Island National Guard on October 11, 1963 and accepted a service obligation for six years. As a result, his induction notice

was cancelled, and Katz was reclassified as 1-D. He thereupon served a one year tour of active duty in the Army which expired on October 24, 1964. On April 18, 1966, he was released from the Rhode Island National Guard and transferred to the rolls of the United States Army Reserve, of which he is still a member. His service file rests with the Control Group (Annual Training) of the Army Administrative Center in St. Louis. Katz's military obligation will expire on October 10, 1969. His draft classification, of course, remains at 1-D.

Katz does not and cannot contend that he presently is being injured as a result of implementation of the UMTSA. His allegation is that if he is recalled to active duty, he will sustain pecuniary injury because of the nature of his business and because his life may be placed in jeopardy. At the present time, however, Katz has not been assigned to any reserve unit. Therefore, the liklihood of his being called to active duty is very remote.[4] Further, even if he were unexpectedly called to active duty, the law expressly requires that he be given a reasonable time to terminate his business and/or personal affairs before reporting for duty. See 10 U.S.C. § 672.

Since Katz has not shown that he has sustained or is immediately in danger of sustaining some direct injury as the result of the enforcement of the UMTSA, he has no standing to press his

[4] See Army Regulation No. 135-300. This regulation provides that Ready Reserve Units are subject to active duty only if a Presidential Proclamation to that effect is issued in times of national emergency. Also, although it is nowhere stated, it is reasonable to presume that if the reserves were activated, regular reserve units would be called before unattached reservists.

claim in the sense that he presents no clearly existing claim or controversy for adjudication by this court. See United Public Workers v. Mitchell, 330 U.S. 75 (1947); Cramp v. Board of Public Instructions, 368 U.S. 278 (1961).

The inability of plaintiffs to show that they have standing to challenge the validity of the UMTSA is not the only reason why this court declines to convene a three-judge court. Plaintiffs have also failed to show that the constitutional question they allege is substantial.

It is said in the complaint that the UMTSA as a comprehensive statutory scheme violates plaintiffs' constitutional rights under the Ninth Amendment and the Eighth Article of the "Nuremberg Charter". In support of their theory, plaintiffs argue in their briefs that the constitutionality of the Act has never been challenged under either the Ninth Amendment or the "Nuremberg Charter".

In candor, the precise thrust of plaintiffs' various assigned reasons of unconstitutionality is not entirely clear. Nevertheless, it is plain enough that their central contention boils down to the point that the power of conscription goes to the essence of the unconstitutionality of the UMTSA. They argue that military service entails for the individual a loss of his freedom to pursue his own vocation, a substantial restraint on his freedom of movement and a possible loss of his life. In other words, a law which provides that an individual can be involuntarily compelled to serve in the armed forces is necessarily unconstitutional because it deprives a person of all of the aforementioned rights.

Without attempting to examine the merits of this argument, I find that the power of Congress to provide for involuntary conscription has been upheld on numerous occasions. United States v. Nugent, 346 U.S. 1 (1953); Etcheverry v. United States, 320 F.2d 873 (9th Cir. 1963); United States v. Miller, 233 F.2d 171 (2d Cir. 1956); United States v. Kime, 188 F.2d 677 (7th Cir. 1951); United States v. Henderson, 180 F.2d 711 (7th Cir. 1956). The Court in United States v. Nugent said, "the Selective Service Act is a comprehensive statute designed to provide an orderly, efficient and fair procedure to marshal the available manpower of the country, to impose a common obligation of military service on all physically fit young men. It is a valid exercise of the war power." 346 U.S. at 9. (Emphasis added.)

In Ex parte Poresky, 290 U.S. 30 (1933), the Supreme Court held that in order to find a substantial constitutional question, a district court must determine that the question is not "obviously without merit" or, alternatively, that the question has not been previously ruled on by the United States Supreme Court.

As indicated above, the question of the power of Congress to enact the UMTSA has been ruled on by the Supreme Court as well as numerous other federal appellate courts.

Further, in my opinion the question raised by plaintiffs is "obviously without merit". Plaintiffs essentially maintain here that their rights which are allegedly infringed by UMTSA are "life" and "liberty", rights which are clearly

protected by the due process clause of the Fifth Amendment,[5] notwithstanding their bland assertion that they rely not upon the Fifth but on the Ninth Amendment. The latter, so rarely invoked by lawyers and litigants, is worth setting forth verbatim here:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

To support their argument under the Ninth Amendment, plaintiffs rely almost exclusively on the recent case of Griswold v. Connecticut, 381 U.S. 479 (1965). The Court in Griswold held that a Connecticut criminal statute forbidding the use of contraceptive devices by married couples was unconstitutional because it invaded a constitutionally protected right of marital privacy found to emanate from the specific provisions of the Bill of Rights made applicable to the states by the Fourteenth Amendment. In a concurring opinion, Mr. Justice Goldberg stated his belief that the right of privacy as invoked and protected is a fundamental right protected by the due process clause even though it is not expressly enumerated in the first eight amendments. In support of this view, Justice Goldberg relied in part upon the Ninth Amendment as evidencing "...a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the

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5 "No person shall be... deprived of life, liberty, or property without due process of law."

list of rights included there not be deemed exhaustive" 381 U.S. at 492. (Emphasis added.) Significantly, however, he expressly repudiated the argument that the Ninth Amendment "constitutes an independent source of rights protected from infringement by either the states or the Federal Government" 381 U.S. at 530 [Sic: 492].

It is apparent that the rights of plaintiffs allegedly infringed by UMTSA are specifically enumerated in the due process clause of the Fifth Amendment. Consequently, the Ninth Amendment is no support whatsoever to plaintiffs' position--unless plaintiffs are willing to urge that there is a fundamental right rooted in the traditions of our people (see Snyder v. Massachusetts, 291 U.S. 97, at 105 (1934)) to be free from any responsibilities to our country, which, to put it tactfully, is a reductio ad absurdum.

Plaintiffs also argue that UMTSA violates their "rights" under the Eighth Article of the Nuremberg Charter.[7] 59 Stat. 1544. This Article states:

> "The fact that the defendant acted pursuant to orders of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment."

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[7] The correct title of this international agreement is "Charter of the International Military Tribunal", 59 Stat. 1546 (1945).

There are three categories of crimes listed by the Charter of the International Military Tribunal. These categories are: (1) Crimes against Peace; (2) War Crimes; and (3) Crimes against Humanity. 59 Stat. 1547. It comes as no surprise to find that plaintiffs have not even attempted to show that this country is committing any of these crimes or that it has commanded any of its citizens to do so. Thus, they have utterly failed to make even a prima facie showing of how they will be adversely affected by the Nuremberg Charter.

Accordingly, the motion to convene a three-judge court is denied, and the government's cross motion to dismiss the complaint for want of jurisdiction over the subject matter thereof is granted.

Settle order accordingly.

August 4, 1966.

s/ H. R. Tyler, Jr.
U.S.D.J.

Appendix B-2. Order of District Court

ORDERED that the plaintiffs' motion to convene a three judge court be and the same is hereby denied, and it is

FURTHER ORDERED AND ADJUDGED that the defendants' motion to dismiss the complaint be and the same is hereby granted.

Dated: New York, New York
August 30, 1966

s/ H. R. Tyler, Jr.
U.S.D.J.

Appendix B-3. Opinion of Court of Appeals (2d Circuit)

Application denied.

October 19, 1966

S.R.W.
P.R.H.
R.P.A.

Appendix B-4. Order of Court of Appeals (2nd Circuit)

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the nineteenth day of October, one thousand nine hundred and sixty-six.

Present:

HON. STERRY R. WATERMAN,

HON. PAUL R. HAYS,

HON. ROBERT P. ANDERSON,

Circuit Judges.

A petition for a writ of mandamus having been filed herein by counsel for the petitioners and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

s/ A. Daniel Fusaro
Clerk

Appendix C - Lecture: Objectivist Ethics

THE OBJECTIVIST ETHICS

BY AYN RAND

Since I am to speak on the Objectivist Ethics, I shall begin by quoting its best representative—John Galt, in *Atlas Shrugged:*

"Through centuries of scourges and disasters, brought about by your code of morality, you have cried that your code had been broken, that the scourges were punishment for breaking it, that men were too weak and too selfish to spill all the blood it required. You damned man, you damned existence, you damned this earth, but never dared to question your code. . . . You went on crying that your code was noble, but human nature was not good enough to practice it. And no one rose to ask the question: Good?—by what standard?

"You wanted to know John Galt's identity. I am the man who has asked that question.

Paper delivered by Ayn Rand at the University of Wisconsin Symposium on "Ethics in Our Time" in Madison, Wisconsin, on February 9, 1961.

Appendix C - Lecture: Objectivist Ethics

"Yes, this *is* an age of moral crisis. . . . Your moral code has reached its climax, the blind alley at the end of its course. And if you wish to go on living, what you now need is not to *return* to morality . . . but to *discover* it."*

What is morality, or ethics? It is a code of values to guide man's choices and actions—the choices and actions that determine the purpose and the course of his life. Ethics, as a science, deals with discovering and defining such a code.

The first question that has to be answered, as a precondition of any attempt to define, to judge or to accept any specific system of ethics, is: *Why* does man need a code of values?

Let me stress this. The first question is not: What particular code of values should man accept? The first question is: Does man need values at all—and why?

Is the concept of *value*, of "good or evil," an arbitrary human invention, unrelated to, underived from and unsupported by any facts of reality—or is it based on a *metaphysical* fact, on an unalterable condition of man's existence? (I use the word "metaphysical" to mean: that which pertains to reality, to the nature of things, to existence.) Does an arbitrary human convention, a mere custom, decree that man must guide his actions by a set of principles—or is there a fact of reality that demands it? Is ethics the province of *whims:* of personal emotions, social edicts and mystic revelations—or is it the province of *reason?* Is ethics a subjective luxury—or an *objective* necessity?

In the sorry record of the history of mankind's ethics—

* Ayn Rand, *Atlas Shrugged*, New York: Random House, 1957; New American Library, 1959.

with a few rare, and unsuccessful, exceptions—moralists have regarded ethics as the province of whims, that is: of the irrational. Some of them did so explicitly, by intention—others implicitly, by default. A "whim" is a desire experienced by a person who does not know and does not care to discover its cause.

No philosopher has given a rational, objectively demonstrable, scientific answer to the question of *why* man needs a code of values. So long as that question remained unanswered, no rational, scientific, *objective* code of ethics could be discovered or defined. The greatest of all philosophers, Aristotle, did not regard ethics as an exact science; he based his ethical system on observations of what the noble and wise men of his time chose to do, leaving unanswered the questions of: *why* they chose to do it and *why* he evaluated them as noble and wise.

Most philosophers took the existence of ethics for granted, as the given, as a historical fact, and were not concerned with discovering its metaphysical cause or objective validation. Many of them attempted to break the traditional monopoly of mysticism in the field of ethics and, allegedly, to define a rational, scientific, nonreligious morality. But their attempts consisted of accepting the ethical doctrines of the mystics and of trying to justify them on *social* grounds, merely substituting *society* for God.

The avowed mystics held the arbitrary, unaccountable "will of God" as the standard of the good and as the validation of their ethics. The neomystics replaced it with "the good of society," thus collapsing into the circularity of a definition such as "the standard of the good is that which is good for society." This meant, in logic—and, today, in worldwide practice—that "society" stands above

any principles of ethics, since *it* is the source, standard and criterion of ethics, since "the good" is whatever *it* wills, whatever *it* happens to assert as its own welfare and pleasure. This meant that "society" may do anything it pleases, since "the good" is whatever it chooses to do *because* it chooses to do it. And—since there is no such entity as "society," since society is only a number of individual men—this meant that *some* men (the majority or any gang that claims to be its spokesman) are ethically entitled to pursue any whims (or any atrocities) they desire to pursue, while *other* men are ethically obliged to spend their lives in the service of that gang's desires.

This could hardly be called rational, yet most philosophers have now decided to declare that reason has failed, that ethics is outside the power of reason, that no rational ethics can ever be defined, and that in the field of ethics—in the choice of his values, of his actions, of his pursuits, of his life's goals—man must be guided by something other than reason. By what? Faith—instinct—intuition—revelation—feeling—taste—urge—wish—*whim*. Today, as in the past, most philosophers agree that the ultimate standard of ethics is *whim* (they call it "arbitrary postulate" or "subjective choice" or "emotional commitment")—and the battle is only over the question of *whose* whim: one's own or society's or the dictator's or God's. Whatever else they may disagree about, today's moralists agree that ethics is a *subjective* issue and that the three things barred from its field are: reason—mind—reality.

If you wonder why the world is now collapsing to a lower and ever lower rung of hell, *this* is the reason.

If you want to save civilization, it is *this* premise of

modern ethics—and of all ethical history—that you must challenge.

To challenge the basic premise of any discipline, one must begin at the beginning. In ethics, one must begin by asking: What are *values?* Why does man need them?

"Value" is that which one acts to gain and/or keep. The concept "value" is not a primary; it presupposes an answer to the question: of value to *whom* and for *what?* It presupposes an entity capable of acting to achieve a goal in the face of an alternative. Where no alternative exists, no goals and no values are possible.

I quote from Galt's speech: "There is only one fundamental alternative in the universe: existence or nonexistence—and it pertains to a single class of entities: to living organisms. The existence of inanimate matter is unconditional, the existence of life is not: it depends on a specific course of action. Matter is indestructible, it changes its forms, but it cannot cease to exist. It is only a living organism that faces a constant alternative: the issue of life or death. Life is a process of self-sustaining and self-generated action. If an organism fails in that action, it dies; its chemical elements remain, but its life goes out of existence. It is only the concept of 'Life' that makes the concept of 'Value' possible. It is only to a living entity that things can be good or evil."

To make this point fully clear, try to imagine an immortal, indestructible robot, an entity which moves and acts, but which cannot be affected by anything, which cannot be changed in any respect, which cannot be damaged, injured or destroyed. Such an entity would not be able to have any values; it would have nothing to gain or to lose; it could not regard anything as *for* or *against* it, as serving or threatening its welfare, as fulfilling or frus-

trating its interests. It could have no interests and no goals.

Only a *living* entity can have goals or can originate them. And it is only a living organism that has the capacity for self-generated, goal-directed action. On the *physical* level, the functions of all living organisms, from the simplest to the most complex—from the nutritive function in the single cell of an amoeba to the blood circulation in the body of a man—are actions generated by the organism itself and directed to a single goal: the maintenance of the organism's *life*.*

An organism's life depends on two factors: the material or fuel which it needs from the outside, from its physical background, and the action of its own body, the action of using that fuel *properly*. What standard determines what is *proper* in this context? The standard is the organism's life, or: that which is required for the organism's survival.

No choice is open to an organism in this issue: that which is required for its survival is determined by its *nature*, by the kind of entity it *is*. Many variations, many forms of adaptation to its background are possible to an organism, including the possibility of existing for a while in a crippled, disabled or diseased condition, but the fundamental alternative of its existence remains the same: if an organism fails in the basic functions required

* When applied to physical phenomena, such as the automatic functions of an organism, the term "goal-directed" is not to be taken to mean "purposive" (a concept applicable only to the actions of a consciousness) and is not to imply the existence of any teleological principle operating in insentient nature. I use the term "goal-directed," in this context, to designate the fact that the automatic functions of living organisms are actions whose nature is such that they *result* in the preservation of an organism's life.

by its nature—if an amoeba's protoplasm stops assimilating food, or if a man's heart stops beating—the organism dies. In a fundamental sense, stillness is the antithesis of life. Life can be kept in existence only by a constant process of self-sustaining action. The goal of that action, the ultimate *value* which, to be kept, must be gained through its every moment, is the organism's *life.*

An *ultimate* value is that final goal or end to which all lesser goals are the means—and it sets the standard by which all lesser goals are *evaluated.* An organism's life is its *standard of value:* that which furthers its life is the *good,* that which threatens it is the *evil.*

Without an ultimate goal or end, there can be no lesser goals or means: a series of means going off into an infinite progression toward a nonexistent end is a metaphysical and epistemological impossibility. It is only an ultimate goal, an *end in itself,* that makes the existence of values possible. Metaphysically, *life* is the only phenomenon that is an end in itself: a value gained and kept by a constant process of action. Epistemologically, the concept of "value" is genetically dependent upon and derived from the antecedent concept of "life." To speak of "value" as apart from "life" is worse than a contradiction in terms. "It is only the concept of 'Life' that makes the concept of 'Value' possible."

In answer to those philosophers who claim that no relation can be established between ultimate ends or values and the facts of reality, let me stress that the fact that living entities exist and function necessitates the existence of values and of an ultimate value which for any given living entity is its own life. Thus the validation of value judgments is to be achieved by reference to the

facts of reality. The fact that a living entity *is*, determines what it *ought* to do. So much for the issue of the relation between *"is"* and *"ought."*

Now in what manner does a human being discover the concept of *"value"*? By what means does he first become aware of the issue of *"good or evil"* in its simplest form? By means of the physical sensations of *pleasure* or *pain*. Just as sensations are the first step of the development of a human consciousness in the realm of *cognition*, so they are its first step in the realm of *evaluation*.

The capacity to experience pleasure or pain is innate in a man's body; it is part of his *nature*, part of the kind of entity he *is*. He has no choice about it, and he has no choice about the standard that determines what will make him experience the physical sensation of pleasure or of pain. What is that standard? *His life*.

The pleasure-pain mechanism in the body of man—and in the bodies of all the living organisms that possess the faculty of consciousness—serves as an automatic guardian of the organism's life. The physical sensation of pleasure is a signal indicating that the organism is pursuing the *right* course of action. The physical sensation of pain is a warning signal of danger, indicating that the organism is pursuing the *wrong* course of action, that something is impairing the proper function of its body, which requires action to correct it. The best illustration of this can be seen in the rare, freak cases of children who are born without the capacity to experience physical pain; such children do not survive for long; they have no means of discovering what can injure them, no warning signals, and thus a minor cut can develop into a deadly infection, or a major illness can remain undetected until it is too late to fight it.

Appendix C - Lecture: Objectivist Ethics

Consciousness—for those living organisms which possess it—is the basic means of survival.

The simpler organisms, such as plants, can survive by means of their automatic physical functions. The higher organisms, such as animals and man, cannot: their needs are more complex and the range of their actions is wider. The physical functions of their bodies can perform automatically only the task of using fuel, but cannot *obtain* that fuel. To obtain it, the higher organisms need the faculty of consciousness. A plant can obtain its food from the soil in which it grows. An animal has to hunt for it. Man has to produce it.

A plant has no choice of action; the goals it pursues are automatic and innate, determined by its nature. Nourishment, water, sunlight are the values its nature has set it to seek. Its life is the standard of value directing its actions. There are alternatives in the conditions it encounters in its physical background—such as heat or frost, drought or flood—and there are certain actions which it is able to perform to combat adverse conditions, such as the ability of some plants to grow and crawl from under a rock to reach the sunlight. But whatever the conditions, there is no alternative in a plant's function: it acts automatically to further its life, it cannot act for its own destruction.

The range of actions required for the survival of the higher organisms is wider: it is proportionate to the range of their *consciousness*. The lower of the conscious species possess only the faculty of *sensation*, which is sufficient to direct their actions and provide for their needs. A sensation is produced by the automatic reaction of a sense organ to a stimulus from the outside world; it lasts for the duration of the immediate moment, as long

as the stimulus lasts and no longer. Sensations are an automatic response, an automatic form of knowledge, which a consciousness can neither seek nor evade. An organism that possesses only the faculty of sensation is guided by the pleasure-pain mechanism of its body, that is: by an automatic knowledge and an automatic code of values. Its life is the standard of value directing its actions. Within the range of action possible to it, it acts automatically to further its life and cannot act for its own destruction.

The higher organisms possess a much more potent form of consciousness: they possess the faculty of *retaining* sensations, which is the faculty of *perception*. A "perception" is a group of sensations automatically retained and integrated by the brain of a living organism, which gives it the ability to be aware, not of single stimuli, but of *entities*, of things. An animal is guided, not merely by immediate sensations, but by *percepts*. Its actions are not single, discrete responses to single, separate stimuli, but are directed by an integrated awareness of the *perceptual* reality confronting it. It is able to grasp the perceptual concretes immediately present and it is able to form automatic perceptual associations, but it can go no further. It is able to learn certain skills to deal with specific situations, such as hunting or hiding, which the parents of the higher animals teach their young. But an animal has no choice in the knowledge and the skills that it acquires; it can only repeat them generation after generation. And an animal has no choice in the standard of value directing its actions: its senses provide it with an *automatic* code of values, an automatic knowledge of what is good for it or evil, what benefits or endangers its life. An animal has no power to extend its knowledge or

to evade it. In situations for which its knowledge is inadequate, it perishes—as, for instance, an animal that stands paralyzed on the track of a railroad in the path of a speeding train. But so long as it lives, an animal acts on its knowledge, with automatic safety and no power of choice: it cannot suspend its own consciousness—it cannot choose *not* to perceive—it cannot evade its own perceptions—it cannot ignore its own good, it cannot decide to choose the evil and act as its own destroyer.

Man has no automatic code of survival. He has no automatic course of action, no automatic set of values. His senses do not tell him automatically what is good for him or evil, what will benefit his life or endanger it, what goals he should pursue and what means will achieve them, what *values* his life depends on, what course of action it requires. His own consciousness has to discover the answers to all these questions—but his consciousness will not function *automatically*. Man, the highest living species on this earth—the being whose consciousness has a limitless capacity for gaining knowledge—man is the only living entity born without any guarantee of *remaining* conscious at all. Man's particular distinction from all other living species is the fact that *his* consciousness is *volitional*.

Just as the automatic values directing the functions of a plant's body are sufficient for its survival, but are not sufficient for an animal's—so the automatic values provided by the sensory-perceptual mechanism of its consciousness are sufficient to guide an animal, but are not sufficient for man. Man's actions and survival require the guidance of *conceptual* values derived from *conceptual* knowledge. But *conceptual* knowledge cannot be acquired *automatically*.

Appendix C - Lecture: Objectivist Ethics

A *"concept"* is a mental integration of two or more perceptual concretes, which are isolated by a process of *abstraction* and united by means of a specific definition. Every word of man's language, with the exception of proper names, denotes a *concept*, an abstraction that stands for an unlimited number of concretes of a specific kind. It is by organizing his perceptual material into concepts, and his concepts into wider and still wider concepts that man is able to grasp and retain, to identify and integrate an unlimited amount of knowledge, a knowledge extending beyond the immediate perceptions of any given, immediate moment. Man's sense organs function automatically; man's brain integrates his sense data into percepts automatically; but the process of integrating percepts into concepts—the process of abstraction and of concept-formation—is *not* automatic.

The process of concept-formation does not consist merely of grasping a few simple abstractions, such as "chair," "table," "hot," "cold," and of learning to speak. It consists of a method of using one's consciousness, best designated by the term "conceptualizing." It is not a passive state of registering random impressions. It is an actively sustained process of identifying one's impressions in conceptual terms, of integrating every event and every observation into a conceptual context, of grasping relationships, differences, similarities in one's perceptual material and of abstracting them into new concepts, of drawing inferences, of making deductions, of reaching conclusions, of asking new questions and discovering new answers and expanding one's knowledge into an ever-growing sum. The faculty that directs this process, the faculty that works by means of concepts, is: *reason*. The process is *thinking*.

Appendix C - Lecture: Objectivist Ethics

Reason is the faculty that identifies and integrates the material provided by man's senses. It is a faculty that man has to exercise *by choice.* Thinking is not an automatic function. In any hour and issue of his life, man is free to think or to evade that effort. Thinking requires a state of full, focused awareness. The act of focusing one's consciousness is volitional. Man can focus his mind to a full, active, purposefully directed awareness of reality—or he can unfocus it and let himself drift in a semiconscious daze, merely reacting to any chance stimulus of the immediate moment, at the mercy of his undirected sensory-perceptual mechanism and of any random, associational connections it might happen to make.

When man unfocuses his mind, he may be said to be conscious in a subhuman sense of the word, since he experiences sensations and perceptions. But in the sense of the word applicable to man—in the sense of a consciousness which is aware of reality and able to deal with it, a consciousness able to direct the actions and provide for the survival of a human being—an unfocused mind is *not* conscious.

Psychologically, the choice "to think or not" is the choice "to focus or not." Existentially, the choice "to focus or not" is the choice "to be conscious or not." Metaphysically, the choice "to be conscious or not" is the choice of life or death.

Consciousness—for those living organisms which possess it—is the basic means of survival. For man, the basic means of survival is *reason.* Man cannot survive, as animals do, by the guidance of mere percepts. A sensation of hunger will tell him that he needs food (if he has learned to identify it as "hunger"), but it will not tell

him how to obtain his food and it will not tell him what food is good for him or poisonous. He cannot provide for his simplest physical needs without a process of thought. He needs a process of thought to discover how to plant and grow his food or how to make weapons for hunting. His percepts might lead him to a cave, if one is available —but to build the simplest shelter, he needs a process of thought. No percepts and no "instincts" will tell him how to light a fire, how to weave cloth, how to forge tools, how to make a wheel, how to make an airplane, how to perform an appendectomy, how to produce an electric light bulb or an electronic tube or a cyclotron or a box of matches. Yet his life depends on such knowledge —and only a volitional act of his consciousness, a process of thought, can provide it.

But man's responsibility goes still further: a process of thought is not automatic nor "instinctive" nor involuntary—nor *infallible*. Man has to initiate it, to sustain it and to bear responsibility for its results. He has to discover how to tell what is true or false and how to correct his own errors; he has to discover how to validate his concepts, his conclusions, his knowledge; he has to discover the rules of thought, *the laws of logic*, to direct his thinking. Nature gives him no automatic guarantee of the efficacy of his mental effort.

Nothing is given to man on earth except a potential and the material on which to actualize it. The potential is a superlative machine: his consciousness; but it is a machine without a spark plug, a machine of which his own will has to be the spark plug, the self-starter and the driver; *he* has to discover how to use it and *he* has to keep it in constant action. The material is the whole of the universe, with no limits set to the knowledge he can

acquire and to the enjoyment of life he can achieve. But everything he needs or desires has to be learned, discovered and produced by *him*—by his own choice, by his own effort, by his own mind.

A being who does not know automatically what is true or false, cannot know automatically what is right or wrong, what is good for him or evil. Yet he needs that knowledge in order to live. He is not exempt from the laws of reality, he is a specific organism of a specific nature that requires specific actions to sustain his life. He cannot achieve his survival by arbitrary means nor by random motions nor by blind urges nor by chance nor by whim. That which his survival requires is set by his nature and is not open to his choice. What *is* open to his choice is only whether he will discover it or not, whether he will choose the right goals and *values* or not. He is free to make the wrong choice, but not free to succeed with it. He is free to evade reality, he is free to unfocus his mind and stumble blindly down any road he pleases, but not free to avoid the abyss he refuses to see. Knowledge, for any conscious organism, is the means of survival; to a living consciousness, every *"is"* implies an *"ought."* Man is free to choose not to be conscious, but not free to escape the penalty of unconsciousness: destruction. Man is the only living species that has the power to act as his own destroyer—and that is the way he has acted through most of his history.

What, then, are the right goals for man to pursue? What are the values his survival requires? That is the question to be answered by the science of *ethics*. And *this*, ladies and gentlemen, is why man needs a code of ethics.

Now you can assess the meaning of the doctrines

which tell you that ethics is the province of the irrational, that reason cannot guide man's life, that his goals and values should be chosen by vote or by whim—that ethics has nothing to do with reality, with existence, with one's practical actions and concerns—or that the goal of ethics is beyond the grave, that the dead need ethics, not the living.

Ethics is *not* a mystic fantasy—nor a social convention—nor a dispensable, subjective luxury, to be switched or discarded in any emergency. Ethics is an *objective, metaphysical necessity of man's survival*—not by the grace of the supernatural nor of your neighbors nor of your whims, but by the grace of reality and the nature of life.

I quote from Galt's speech: "Man has been called a rational being, but rationality is a matter of choice—and the alternative his nature offers him is: rational being or suicidal animal. Man has to be man—by choice; he has to hold his life as a value—by choice; he has to learn to sustain it—by choice; he has to discover the values it requires and practice his virtues—by choice. A code of values accepted by choice is a code of morality."

The standard of value of the Objectivist ethics—the standard by which one judges what is good or evil—is *man's life*, or: that which is required for man's survival *qua* man.

Since reason is man's basic means of survival, that which is proper to the life of a rational being is the good; that which negates, opposes or destroys it is the evil.

Since everything man needs has to be discovered by his own mind and produced by his own effort, the two essentials of the method of survival proper to a rational being are: thinking and productive work.

If some men do not choose to think, but survive by

imitating and repeating, like trained animals, the routine of sounds and motions they learned from others, never making an effort to understand their own work, it still remains true that their survival is made possible only by those who did choose to think and to discover the motions they are repeating. The survival of such mental parasites depends on blind chance; their unfocused minds are unable to know *whom* to imitate, *whose* motions it is safe to follow. *They* are the men who march into the abyss, trailing after any destroyer who promises them to assume the responsibility they evade: the responsibility of being conscious.

If some men attempt to survive by means of brute force or fraud, by looting, robbing, cheating or enslaving the men who produce, it still remains true that their survival is made possible only by their victims, only by the men who choose to think and to produce the goods which they, the looters, are seizing. Such looters are parasites incapable of survival, who exist by destroying those who *are* capable, those who are pursuing a course of action proper to man.

The men who attempt to survive, not by means of reason, but by means of force, are attempting to survive by the method of animals. But just as animals would not be able to survive by attempting the method of plants, by rejecting locomotion and waiting for the soil to feed them—so men cannot survive by attempting the method of animals, by rejecting reason and counting on productive *men* to serve as their prey. Such looters may achieve their goals for the range of a moment, at the price of destruction: the destruction of their victims and their own. As evidence, I offer you any criminal or any dictatorship.

Appendix C - Lecture: Objectivist Ethics

Man cannot survive, like an animal, by acting on the range of the moment. An animal's life consists of a series of separate cycles, repeated over and over again, such as the cycle of breeding its young, or of storing food for the winter; an animal's consciousness cannot integrate its entire lifespan; it can carry just so far, then the animal has to begin the cycle all over again, with no connection to the past. *Man's* life is a continuous whole: for good or evil, every day, year and decade of his life holds the sum of all the days behind him. He can alter his choices; he is free to change the direction of his course, he is even free, in many cases, to atone for the consequences of his past—but he is not free to escape them, nor to live his life with impunity on the range of the moment, like an animal, a playboy or a thug. If he is to succeed at the task of survival, if his actions are not to be aimed at his own destruction, man has to choose his course, his goals, his values in the context and terms of a lifetime. No sensations, percepts, urges or "instincts" can do it; only a mind can.

Such is the meaning of the definition: that which is required for man's survival *qua* man. It does not mean a *momentary* or a merely *physical* survival. It does not mean the momentary physical survival of a mindless brute, waiting for another brute to crush his skull. It does not mean the momentary physical survival of a crawling aggregate of muscles who is willing to accept any terms, obey any thug and surrender any values, for the sake of what is known as "survival at any price," which may or may not last a week or a year. "Man's survival *qua* man" means the terms, methods, conditions and goals required for the survival of a rational being through the whole of his lifespan—in all those aspects of existence which are open to his choice.

Appendix C - Lecture: Objectivist Ethics

Man cannot survive as anything but man. He *can* abandon his means of survival, his mind, he *can* turn himself into a subhuman creature and he *can* turn his life into a brief span of agony—just as his body can exist for a while in the process of disintegration by disease. But he *cannot* succeed, as a subhuman, in achieving anything but the subhuman—as the ugly horror of the anti-rational periods of mankind's history can demonstrate. Man has to be man by choice—and it is the task of ethics to teach him how to live like man.

The Objectivist ethics holds man's life as the *standard* of value—and *his own life* as the ethical *purpose* of every individual man.

The difference between "standard" and "purpose" in this context is as follows: a "standard" is an abstract principle that serves as a measurement or gauge to guide a man's choices in the achievement of a concrete, specific purpose. "That which is required for the survival of man *qua* man" is an abstract principle that applies to every individual man. The task of applying this principle to a concrete, specific purpose—the purpose of living a life proper to a rational being—belongs to every individual man, and the life he has to live is his own.

Man must choose his actions, values and goals by the standard of that which is proper to man—in order to achieve, maintain, fulfill and enjoy that ultimate value, that end in itself, which is his own life.

Value is that which one acts to gain and/or keep—*virtue* is the act by which one gains and/or keeps it. The three cardinal values of the Objectivist ethics—the three values which, together, are the means to and the realization of one's ultimate value, one's own life—are: Reason,

Purpose, Self-Esteem, with their three corresponding virtues: Rationality, Productiveness, Pride.

Productive work is the central *purpose* of a rational man's life, the central value that integrates and determines the hierarchy of all his other values. Reason is the source, the precondition of his productive work—pride is the result.

Rationality is man's basic virtue, the source of all his other virtues. Man's basic vice, the source of all his evils, is the act of unfocusing his mind, the suspension of his consciousness, which is not blindness, but the refusal to see, not ignorance, but the refusal to know. Irrationality is the rejection of man's means of survival and, therefore, a commitment to a course of blind destruction; that which is anti-mind, is anti-life.

The virtue of *Rationality* means the recognition and acceptance of reason as one's only source of knowledge, one's only judge of values and one's only guide to action. It means one's total commitment to a state of full, conscious awareness, to the maintenance of a full mental focus in all issues, in all choices, in all of one's waking hours. It means a commitment to the fullest perception of reality within one's power and to the constant, active expansion of one's perception, *i.e.*, of one's knowledge. It means a commitment to the reality of one's own existence, *i.e.*, to the principle that all of one's goals, values and actions take place in reality and, therefore, that one must never place any value or consideration whatsoever above one's perception of reality. It means a commitment to the principle that all of one's convictions, values, goals, desires and actions must be based on, derived from, chosen and validated by a process of thought—as precise and scrupulous a process of thought, directed by

as ruthlessly strict an application of logic, as one's fullest capacity permits. It means one's acceptance of the responsibility of forming one's own judgments and of living by the work of one's own mind (which is the virtue of Independence). It means that one must never sacrifice one's convictions to the opinions or wishes of others (which is the virtue of Integrity)—that one must never attempt to fake reality in any manner (which is the virtue of Honesty)—that one must never seek or grant the unearned and undeserved, neither in matter nor in spirit (which is the virtue of Justice). It means that one must never desire effects without causes, and that one must never enact a cause without assuming full responsibility for its effects—that one must never act like a zombie, *i.e.*, without knowing one's own purposes and motives—that one must never make any decisions, form any convictions or seek any values out of context, *i.e.*, apart from or against the total, integrated sum of one's knowledge—and, above all, that one must never seek to get away with contradictions. It means the rejection of any form of *mysticism*, *i.e.*, any claim to some nonsensory, nonrational, nondefinable, supernatural source of knowledge. It means a commitment to reason, not in sporadic fits or on selected issues or in special emergencies, but as a permanent way of life.

The virtue of *Productiveness* is the recognition of the fact that productive work is the process by which man's mind sustains his life, the process that sets man free of the necessity to adjust himself to his background, as all animals do, and gives him the power to adjust his background to himself. Productive work is the road of man's unlimited achievement and calls upon the highest attributes of his character: his creative ability, his ambi-

tiousness, his self-assertiveness, his refusal to bear uncontested disasters, his dedication to the goal of reshaping the earth in the image of his values. "Productive work" does not mean the unfocused performance of the motions of some job. It means the consciously chosen pursuit of a productive career, in any line of rational endeavor, great or modest, on any level of ability. It is not the degree of a man's ability nor the scale of his work that is ethically relevant here, but the fullest and most purposeful use of his mind.

The virtue of *Pride* is the recognition of the fact "that as man must produce the physical values he needs to sustain his life, so he must acquire the values of character that make his life worth sustaining—that as man is a being of self-made wealth, so he is a being of self-made soul." (*Atlas Shrugged.*) The virtue of Pride can best be described by the term: "moral ambitiousness." It means that one must earn the right to hold oneself as one's own highest value by achieving one's own moral perfection—which one achieves by never accepting any code of irrational virtues impossible to practice and by never failing to practice the virtues one knows to be rational—by never accepting an unearned guilt and never earning any, or, if one *has* earned it, never leaving it uncorrected—by never resigning oneself passively to any flaws in one's character—by never placing any concern, wish, fear or mood of the moment above the reality of one's own self-esteem. And, above all, it means one's rejection of the role of a sacrificial animal, the rejection of any doctrine that preaches self-immolation as a moral virtue or duty.

The basic *social* principle of the Objectivist ethics is that just as life is an end in itself, so every living human

being is an end in himself, not the means to the ends or the welfare of others—and, therefore, that man must live for his own sake, neither sacrificing himself to others nor sacrificing others to himself. To live for his own sake means that *the achievement of his own happiness is man's highest moral purpose.*

In psychological terms, the issue of man's survival does not confront his consciousness as an issue of "life or death," but as an issue of "happiness or suffering." Happiness is the successful state of life, suffering is the warning signal of failure, of death. Just as the pleasure-pain mechanism of man's body is an automatic indicator of his body's welfare or injury, a barometer of its basic alternative, life or death—so the emotional mechanism of man's consciousness is geared to perform the same function, as a barometer that registers the same alternative by means of two basic emotions: joy or suffering. Emotions are the automatic results of man's value judgments integrated by his subconscious; emotions are estimates of that which furthers man's values or threatens them, that which is *for* him or *against* him—lightning calculators giving him the sum of his profit or loss.

But while the standard of value operating the physical pleasure-pain mechanism of man's body is automatic and innate, determined by the nature of his body—the standard of value operating his emotional mechanism, is *not.* Since man has no automatic knowledge, he can have no automatic values; since he has no innate ideas, he can have no innate value judgments.

Man is born with an emotional mechanism, just as he is born with a cognitive mechanism; but, at birth, *both* are "tabula rasa." It is man's cognitive faculty, his mind, that determines the *content* of both. Man's emotional

mechanism is like an electronic computer, which his mind has to program—and the programming consists of the values his mind chooses.

But since the work of man's mind is not automatic, his values, like all his premises, are the product either of his thinking or of his evasions: man chooses his values by a conscious process of thought—or accepts them by default, by subconscious associations, on faith, on someone's authority, by some form of social osmosis or blind imitation. Emotions are produced by man's premises, held consciously or subconsciously, explicitly or implicitly.

Man has no choice about his capacity to feel that something is good for him or evil, but *what* he will consider good or evil, what will give him joy or pain, what he will love or hate, desire or fear, depends on his standard of value. If he chooses irrational values, he switches his emotional mechanism from the role of his guardian to the role of his destroyer. The irrational is the impossible; it is that which contradicts the facts of reality; facts cannot be altered by a wish, but they *can* destroy the wisher. If a man desires and pursues contradictions—if he wants to have his cake and eat it, too—he disintegrates his consciousness; he turns his inner life into a civil war of blind forces engaged in dark, incoherent, pointless, meaningless conflicts (which, incidentally, is the inner state of most people today).

Happiness is that state of consciousness which proceeds from the achievement of one's values. If a man values productive work, his happiness is the measure of his success in the service of his life. But if a man values destruction, like a sadist—or self-torture, like a masochist—or life beyond the grave, like a mystic—or mindless "kicks," like the driver of a hotrod car—*his* alleged hap-

piness is the measure of his success in the service of his own destruction. It must be added that the emotional state of all those irrationalists cannot be properly designated as happiness or even as pleasure: it is merely a moment's *relief* from their chronic state of terror.

Neither life nor happiness can be achieved by the pursuit of irrational whims. Just as man is free to attempt to survive by any random means, as a parasite, a moocher or a looter, but not free to succeed at it beyond the range of the moment—so he is free to seek his happiness in any irrational fraud, any whim, any delusion, any mindless escape from reality, but not free to succeed at it beyond the range of the moment nor to escape the consequences.

I quote from Galt's speech: "Happiness is a state of non-contradictory joy—a joy without penalty or guilt, a joy that does not clash with any of your values and does not work for your own destruction. . . . Happiness is possible only to a rational man, the man who desires nothing but rational goals, seeks nothing but rational values and finds his joy in nothing but rational actions."

The maintenance of life and the pursuit of happiness are not two separate issues. To hold one's own life as one's ultimate value, and one's own happiness as one's highest purpose are two aspects of the same achievement. Existentially, the activity of pursuing rational goals is the activity of maintaining one's life; psychologically, its result, reward and concomitant is an emotional state of happiness. It is by experiencing happiness that one lives one's life, in any hour, year or the whole of it. And when one experiences the kind of pure happiness that is an end in itself—the kind that makes one think: "*This* is worth living for"—what one is greeting and affirming in emotional terms is the metaphysical fact that *life* is an end in itself.

But the relationship of cause to effect cannot be reversed. It is only by accepting "man's life" as one's primary and by pursuing the rational values it requires that one can achieve happiness—*not* by taking "happiness" as some undefined, irreducible primary and then attempting to live by its guidance. If you achieve that which is the good by a rational standard of value, it will necessarily make you happy; but that which makes you happy, by some undefined emotional standard, is not necessarily the good. To take "whatever makes one happy" as a guide to action means: to be guided by nothing but one's emotional whims. Emotions are not tools of cognition; to be guided by whims—by desires whose source, nature and meaning one does not know—is to turn oneself into a blind robot, operated by unknowable demons (by one's stale evasions), a robot knocking its stagnant brains out against the walls of reality which it refuses to see.

This is the fallacy inherent in *hedonism*—in any variant of ethical hedonism, personal or social, individual or collective. "Happiness" can properly be the *purpose* of ethics, but *not* the *standard*. The task of ethics is to define man's proper code of values and thus to give him the means of achieving happiness. To declare, as the ethical hedonists do, that "the proper value is whatever gives you pleasure" is to declare that "the proper value is whatever you happen to value"—which is an act of intellectual and philosophical abdication, an act which merely proclaims the futility of ethics and invites all men to play it deuces wild.

The philosophers who attempted to devise an allegedly rational code of ethics gave mankind nothing but a choice of whims: the "selfish" pursuit of one's own

whims (such as the ethics of Nietzsche)—or "selfless" service to the whims of others (such as the ethics of Bentham, Mill, Comte and of all social hedonists, whether they allowed man to include his own whims among the millions of others or advised him to turn himself into a totally selfless "shmoo" that seeks to be eaten by others).

When a "desire," regardless of its nature or cause, is taken as an ethical primary, and the gratification of any and all desires is taken as an ethical goal (such as "the greatest happiness of the greatest number")—men have no choice but to hate, fear and fight one another, because their desires and their interests will necessarily clash. If "desire" is the ethical standard, then one man's desire to produce and another man's desire to rob him have equal ethical validity; one man's desire to be free and another man's desire to enslave him have equal ethical validity; one man's desire to be loved and admired for his virtues and another man's desire for undeserved love and unearned admiration have equal ethical validity. And if the frustration of *any* desire constitutes a *sacrifice*, then a man who owns an automobile and is robbed of it, is being sacrificed, but so is the man who wants or "aspires to" an automobile which the owner refuses to give him—and these two "sacrifices" have equal ethical status. If so, then man's only choice is to rob or be robbed, to destroy or be destroyed, to sacrifice others to any desire of his own or to sacrifice himself to any desire of others; then man's only ethical alternative is to be a sadist or a masochist.

The *moral cannibalism* of all hedonist and altruist doctrines lies in the premise that the happiness of one man necessitates the injury of another.

Today, most people hold this premise as an absolute not to be questioned. And when one speaks of man's right to exist for his own sake, for his own rational self-interest, most people assume automatically that this means his right to sacrifice others. Such an assumption is a confession of their own belief that to injure, enslave, rob or murder others is in man's self-interest—which he must selflessly renounce. The idea that man's self-interest can be served only by a non-sacrificial relationship with others has never occurred to those humanitarian apostles of unselfishness, who proclaim their desire to achieve the brotherhood of men. And it will not occur to them, or to anyone, so long as the concept "rational" is omitted from the context of "values," "desires," "self-interest" and *ethics*.

The Objectivist ethics proudly advocates and upholds *rational selfishness*—which means: the values required for man's survival *qua* man—which means: the values required for *human* survival—not the values produced by the desires, the emotions, the "aspirations," the feelings, the whims or the needs of irrational brutes, who have never outgrown the primordial practice of human sacrifices, have never discovered an industrial society and can conceive of no self-interest but that of grabbing the loot of the moment.

The Objectivist ethics holds that *human* good does not require human sacrifices and cannot be achieved by the sacrifice of anyone to anyone. It holds that the *rational* interests of men do not clash—that there is no conflict of interests among men who do not desire the unearned, who do not make sacrifices nor accept them, who deal with one another as *traders*, giving value for value.

The principle of *trade* is the only rational ethical principle for all human relationships, personal and social, private and public, spiritual and material. It is the principle of *justice.*

A trader is a man who earns what he gets and does not give or take the undeserved. He does not treat men as masters or slaves, but as independent equals. He deals with men by means of a free, voluntary, unforced, uncoerced exchange—an exchange which benefits both parties by their own independent judgment. A trader does not expect to be paid for his defaults, only for his achievements. He does not switch to others the burden of his failures, and he does not mortgage his life into bondage to the failures of others.

In spiritual issues—(by "spiritual" I mean: "pertaining to man's consciousness")—the currency or medium of exchange is different, but the principle is the same. Love, friendship, respect, admiration are the emotional response of one man to the virtues of another, the spiritual *payment* given in exchange for the personal, selfish pleasure which one man derives from the virtues of another man's character. Only a brute or an altruist would claim that the appreciation of another person's virtues is an act of selflessness, that as far as one's own selfish interest and pleasure are concerned, it makes no difference whether one deals with a genius or a fool, whether one meets a hero or a thug, whether one marries an ideal woman or a slut. In spiritual issues, a trader is a man who does not seek to be loved for his weaknesses or flaws, only for his virtues, and who does not grant his love to the weaknesses or the flaws of others, only to their virtues.

To love is to value. Only a rationally selfish man, a man of *self-esteem,* is capable of love—because he is the

only man capable of holding firm, consistent, uncompromising, unbetrayed values. The man who does not value himself, cannot value anything or anyone.

It is only on the basis of rational selfishness—on the basis of justice—that men can be fit to live together in a free, peaceful, prosperous, benevolent, *rational* society.

Can man derive any personal benefit from living in a human society? Yes—if it is a *human* society. The two great values to be gained from social existence are: knowledge and trade. Man is the only species that can transmit and expand his store of knowledge from generation to generation; the knowledge potentially available to man is greater than any one man could begin to acquire in his own lifespan; every man gains an incalculable benefit from the knowledge discovered by others. The second great benefit is the division of labor: it enables a man to devote his effort to a particular field of work and to trade with others who specialize in other fields. This form of cooperation allows all men who take part in it to achieve a greater knowledge, skill and productive return on their effort than they could achieve if each had to produce everything he needs, on a desert island or on a self-sustaining farm.

But these very benefits indicate, delimit and define what kind of men can be of value to one another and in what kind of society: only rational, productive, independent men in a rational, productive, free society. Parasites, moochers, looters, brutes and thugs can be of no value to a human being—nor can he gain any benefit from living in a society geared to *their* needs, demands and protection, a society that treats him as a sacrificial animal and penalizes him for his virtues in order to reward *them* for their vices, which means: a society based

on the ethics of altruism. No society can be of value to man's life if the price is the surrender of his right to his life.

The basic political principle of the Objectivist ethics is: no man may *initiate* the use of physical force against others. No man—or group or society or government—has the right to assume the role of a criminal and initiate the use of physical compulsion against any man. Men have the right to use physical force *only* in retaliation and *only* against those who initiate its use. The ethical principle involved is simple and clear-cut: it is the difference between murder and self-defense. A holdup man seeks to gain a value, wealth, by killing his victim; the victim does not grow richer by killing a holdup man. The principle is: no man may obtain any values from others by resorting to physical force.

The only proper, *moral* purpose of a government is to protect man's rights, which means: to protect him from physical violence—to protect his right to his own life, to his own liberty, to his own *property* and to the pursuit of his own happiness. Without property rights, no other rights are possible.

I will not attempt, in a brief lecture, to discuss the political theory of Objectivism. Those who are interested will find it presented in full detail in *Atlas Shrugged*. I will say only that every political system is based on and derived from a theory of ethics—and that the Objectivist ethics is the moral base needed by that politico-economic system which, today, is being destroyed all over the world, destroyed precisely for lack of a *moral*, philosophical defense and validation: the original American system, *Capitalism*. If it perishes, it will perish by default, undiscovered and unidentified: no

other subject has ever been hidden by so many distortions, misconceptions and misrepresentations. Today, few people know what capitalism is, how it works and what was its actual history.

When I say "capitalism," I mean a full, pure, uncontrolled, unregulated laissez-faire capitalism—with a separation of state and economics, in the same way and for the same reasons as the separation of state and church. A pure system of capitalism has never yet existed, not even in America; various degrees of government control had been undercutting and distorting it from the start. Capitalism is not the system of the past; it is the system of the future—if mankind is to have a future.

For those who are interested in the history and the psychological causes of the philosophers' treason against capitalism, I will mention that I discuss them in the title essay of my book *For the New Intellectual.**

The present discussion has to be confined to the subject of ethics. I have presented the barest essentials of my system, but they are sufficient to indicate in what manner the Objectivist ethics is the morality of life—as against the three major schools of ethical theory, the mystic, the social, the subjective, which have brought the world to its present state and which represent the morality of death.

These three schools differ only in their method of approach, not in their content. In content, they are merely variants of altruism, the ethical theory which regards man as a sacrificial animal, which holds that man has no right to exist for his own sake, that service to others is the only justification of his existence, and that self-

* Ayn Rand, *For the New Intellectual*, New York: Random House, 1961; New American Library, 1963.

sacrifice is his highest moral duty, virtue and value. The differences occur only over the question of who is to be sacrificed to whom. Altruism holds *death* as its ultimate goal and standard of value—and it is logical that renunciation, resignation, self-denial, and every other form of suffering, including self-destruction, are the virtues it advocates. And, logically, these are the only things that the practitioners of altruism have achieved and are achieving now.

Observe that these three schools of ethical theory are anti-life, not merely in content, but also in their method of approach.

The mystic theory of ethics is explicitly based on the premise that the standard of value of man's ethics is set beyond the grave, by the laws or requirements of another, supernatural dimension, that ethics is impossible for man to practice, that it is unsuited for and opposed to man's life on earth, and that man must take the blame for it and suffer through the whole of his earthly existence, to atone for the guilt of being unable to practice the impracticable. The Dark Ages and the Middle Ages are the existential monument to *this* theory of ethics.

The social theory of ethics substitutes "society" for God—and although it claims that its chief concern is life on earth, it is *not* the life of man, not the life of an individual, but the life of a disembodied entity, *the collective*, which, in relation to every individual, consists of everybody except himself. As far as the individual is concerned, *his* ethical duty is to be the selfless, voiceless, rightless slave of any need, claim or demand asserted by others. The motto "dog eat dog"—which is *not* applicable to capitalism nor to dogs—*is* applicable to the so-

cial theory of ethics. The existential monuments to *this* theory are Nazi Germany and Soviet Russia.

The subjectivist theory of ethics is, strictly speaking, not a theory, but a negation of ethics. And more: it is a negation of reality, a negation not merely of man's existence, but of *all* existence. Only the concept of a fluid, plastic, indeterminate, Heraclitean universe could permit anyone to think or to preach that man needs no *objective* principles of action—that reality gives him a blank check on values—that anything he cares to pick as the good or the evil, will do—that a man's whim is a valid moral standard, and that the only question is how to get away with it. The existential monument to *this* theory is the present state of our culture.

It is not men's *immorality* that is responsible for the collapse now threatening to destroy the civilized world, but the kind of *moralities* men have been asked to practice. The responsibility belongs to the philosophers of altruism. They have no cause to be shocked by the spectacle of their own success, and no right to damn human nature: men have obeyed them and have brought their moral ideals into full reality.

It is philosophy that sets men's goals and determines their course; it is only philosophy that can save them now. Today, the world is facing a choice: if civilization is to survive, it is the altruist morality that men have to reject.

I will close with the words of John Galt, which I address, as he did, to all the moralists of altruism, past or present:

"You have been using fear as your weapon and have been bringing death to man as his punishment for rejecting your morality. We offer him life as his reward for accepting ours."

Appendix D - Essay: Man's Rights

MAN'S RIGHTS

BY AYN RAND

If one wishes to advocate a free society—that is, capitalism—one must realize that its indispensable foundation is the principle of individual rights. If one wishes to uphold individual rights, one must realize that capitalism is the only system that can uphold and protect them. And if one wishes to gauge the relationship of freedom to the goals of today's intellectuals, one may gauge it by the fact that the concept of individual rights is evaded, distorted, perverted and seldom discussed, most conspicuously seldom by the so-called "conservatives."

"Rights" are a moral concept—the concept that provides a logical transition from the principles guiding an individual's actions to the principles guiding his relationship with others—the concept that preserves and protects individual morality in a social context—the link between the moral code of a man and the legal code of a society, between ethics and politics. *Individual rights are the means of subordinating society to moral law.*

Appendix D - Essay: Man's Rights

Every political system is based on some code of ethics. The dominant ethics of mankind's history were variants of the altruist-collectivist doctrine which subordinated the individual to some higher authority, either mystical or social. Consequently, most political systems were variants of the same statist tyranny, differing only in degree, not in basic principle, limited only by the accidents of tradition, of chaos, of bloody strife and periodic collapse. Under all such systems, morality was a code applicable to the individual, but not to society. Society was placed *outside* the moral law, as its embodiment or source or exclusive interpreter—and the inculcation of self-sacrificial devotion to social duty was regarded as the main purpose of ethics in man's earthly existence.

Since there is no such entity as "society," since society is only a number of individual men, this meant, in practice, that the rulers of society were exempt from moral law; subject only to traditional rituals, they held total power and exacted blind obedience—on the implicit principle of: "The good is that which is good for society (or for the tribe, the race, the nation), and the ruler's edicts are its voice on earth."

This was true of all statist systems, under all variants of the altruist-collectivist ethics, mystical or social. "The Divine Right of Kings" summarizes the political theory of the first—*"Vox populi, vox dei"* of the second. As witness: the theocracy of Egypt, with the Pharaoh as an embodied god—the unlimited majority rule or *democracy* of Athens—the welfare state run by the Emperors of Rome—the Inquisition of the late Middle Ages—the absolute monarchy of France—the welfare state of Bismarck's Prussia—the gas chambers of Nazi Germany—the slaughterhouse of the Soviet Union.

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All these political systems were expressions of the altruist-collectivist ethics—and their common characteristic is the fact that society stood above the moral law, as an omnipotent, sovereign whim worshiper. Thus, politically, all these systems were variants of an *amoral* society.

The most profoundly revolutionary achievement of the United States of America was *the subordination of society to moral law.*

The principle of man's individual rights represented the extension of morality into the social system—as a limitation on the power of the state, as man's protection against the brute force of the collective, as the subordination of *might* to *right.* The United States was the first *moral* society in history.

All previous systems had regarded man as a sacrificial means to the ends of others, and society as an end in itself. The United States regarded man as an end in himself, and society as a means to the peaceful, orderly, *voluntary* co-existence of individuals. All previous systems had held that man's life belongs to society, that society can dispose of him in any way it pleases, and that any freedom he enjoys is his only by favor, by the *permission* of society, which may be revoked at any time. The United States held that man's life is his by *right* (which means: by moral principle and by his nature), that a right is the property of an individual, that society as such has no rights, and that the only moral purpose of a government is the protection of individual rights.

A "right" is a moral principle defining and sanctioning a man's freedom of action in a social context. There is only *one* fundamental right (all the others are its consequences or corollaries): a man's right to his own life. Life is a process of self-sustaining and self-generated

action; the right to life means the right to engage in self-sustaining and self-generated action—which means: the freedom to take all the actions required by the nature of a rational being for the support, the furtherance, the fulfillment and the enjoyment of his own life. (Such is the meaning of the right to life, liberty and the pursuit of happiness.)

The concept of a "right" pertains only to action—specifically, to freedom of action. It means freedom from physical compulsion, coercion or interference by other men.

Thus, for every individual, a right is the moral sanction of a *positive*—of his freedom to act on his own judgment, for his own goals, by his own *voluntary, uncoerced* choice. As to his neighbors, his rights impose no obligations on them except of a *negative* kind: to abstain from violating his rights.

The right to life is the source of all rights—and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no right to the product of his effort has no means to sustain his life. The man who produces while others dispose of his product, is a slave.

Bear in mind that the right to property is a right to action, like all the others: it is not the right *to an object,* but to the action and the consequences of producing or earning that object. It is not a guarantee that a man *will* earn any property, but only a guarantee that he will own it if he earns it. It is the right to gain, to keep, to use and to dispose of material values.

The concept of individual rights is so new in human history that most men have not grasped it fully to this

day. In accordance with the two theories of ethics, the mystical or the social, some men assert that rights are a gift of God—others, that rights are a gift of society. But, in fact, the source of rights is man's nature.

The Declaration of Independence stated that men "are endowed by their Creator with certain unalienable rights." Whether one believes that man is the product of a Creator or of nature, the issue of man's origin does not alter the fact that he is an entity of a specific kind—a rational being—that he cannot function successfully under coercion, and that rights are a necessary condition of his particular mode of survival.

"The source of man's rights is not divine law or congressional law, but the law of identity. A is A—and Man is Man. *Rights* are conditions of existence required by man's nature for his proper survival. If man is to live on earth, it is *right* for him to use his mind, it is *right* to act on his own free judgment, it is *right* to work for his values and to keep the product of his work. If life on earth is his purpose, he has a *right* to live as a rational being: nature forbids him the irrational." (*Atlas Shrugged.*)

To violate man's rights means to compel him to act against his own judgment, or to expropriate his values. Basically, there is only one way to do it: by the use of physical force. There are two potential violators of man's rights: the criminals and the government. The great achievement of the United States was to draw a distinction between these two—by forbidding to the second the legalized version of the activities of the first.

The Declaration of Independence laid down the principle that "to secure these rights, governments are instituted among men." This provided the only valid jus-

tification of a government and defined its only proper purpose: to protect man's rights by protecting him from physical violence.

Thus the government's function was changed from the role of ruler to the role of servant. The government was set to protect man from criminals—and the Constitution was written to protect man from the government. The Bill of Rights was not directed against private citizens, but against the government—as an explicit declaration that individual rights supersede any public or social power.

The result was the pattern of a civilized society which —for the brief span of some hundred and fifty years— America came close to achieving. A civilized society is one in which physical force is banned from human relationships—in which the government, acting as a policeman, may use force *only* in retaliation and *only* against those who initiate its use.

This was the essential meaning and intent of America's political philosophy, implicit in the principle of individual rights. But it was not formulated explicitly, nor fully accepted nor consistently practiced.

America's inner contradiction was the altruist-collectivist ethics. Altruism is incompatible with freedom, with capitalism and with individual rights. One cannot combine the pursuit of happiness with the moral status of a sacrificial animal.

It was the concept of individual rights that had given birth to a free society. It was with the destruction of individual rights that the destruction of freedom had to begin.

A collectivist tyranny dare not enslave a country by an outright confiscation of its values, material or moral. It has to be done by a process of internal corruption. Just

as in the material realm the plundering of a country's wealth is accomplished by inflating the currency—so today one may witness the process of inflation being applied to the realm of rights. The process entails such a growth of newly promulgated "rights" that people do not notice the fact that the meaning of the concept is being reversed. Just as bad money drives out good money, so these "printing-press rights" negate authentic rights.

Consider the curious fact that never has there been such a proliferation, all over the world, of two contradictory phenomena: of alleged new "rights" and of slave-labor camps.

The "gimmick" was the switch of the concept of rights from the political to the economic realm.

The Democratic Party platform of 1960 summarizes the switch boldly and explicitly. It declares that a Democratic Administration "will reaffirm the economic bill of rights which Franklin Roosevelt wrote into our national conscience sixteen years ago."

Bear clearly in mind the meaning of the concept of *"rights"* when you read the list which that platform offers:

"1. The right to a useful and remunerative job in the industries or shops or farms or mines of the nation.

"2. The right to earn enough to provide adequate food and clothing and recreation.

"3. The right of every farmer to raise and sell his products at a return which will give him and his family a decent living.

"4. The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home and abroad.

"5. The right of every family to a decent home.

"6. The right to adequate medical care and the opportunity to achieve and enjoy good health.

"7. The right to adequate protection from the economic fears of old age, sickness, accidents and unemployment.

"8. The right to a good education."

A single question added to each of the above eight clauses would make the issue clear: *At whose expense?*

Jobs, food, clothing, recreation (!), homes, medical care, education, etc., do not grow in nature. These are man-made values—goods and services produced by men. *Who* is to provide them?

If some men are entitled *by right* to the products of the work of others, it means that those others are deprived of rights and condemned to slave labor.

Any alleged "right" of one man, which necessitates the violation of the rights of another, is not and cannot be a right.

No man can have a right to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man. There can be no such thing as *"the right to enslave."*

A right does not include the material implementation of that right by other men; it includes only the freedom to earn that implementation by one's own effort.

Observe, in this context, the intellectual precision of the Founding Fathers: they spoke of the right to *the pursuit* of happiness—*not* of the right to happiness. It means that a man has the right to take the actions he deems necessary to achieve his happiness; it does *not* mean that others must make him happy.

The right to life means that a man has the right to

support his life by his own work (on any economic level, as high as his ability will carry him); it does *not* mean that others must provide him with the necessities of life.

The right to property means that a man has the right to take the economic actions necessary to earn property, to use it and to dispose of it; it does *not* mean that others must provide him with property.

The right of free speech means that a man has the right to express his ideas without danger of suppression, interference or punitive action by the government. It does *not* mean that others must provide him with a lecture hall, a radio station or a printing press through which to express his ideas.

Any undertaking that involves more than one man, requires the *voluntary* consent of every participant. Every one of them has the *right* to make his own decision, but none has the right to force his decision on the others.

There is no such thing as "a right to a job"—there is only the right of free trade, that is: a man's right to take a job if another man chooses to hire him. There is no "right to a home," only the right of free trade: the right to build a home or to buy it. There are no "rights to a 'fair' wage or a 'fair' price" if no one chooses to pay it, to hire a man or to buy his product. There are no "rights of consumers" to milk, shoes, movies or champagne if no producers choose to manufacture such items (there is only the right to manufacture them oneself). There are no "rights" of special groups, there are no "rights of farmers, of workers, of businessmen, of employees, of employers, of the old, of the young, of the unborn." There are only *the Rights of Man*—rights possessed by every individual man and by *all* men as individuals.

Appendix D - Essay: Man's Rights

Property rights and the right of free trade are man's only "economic rights" (they are, in fact, *political* rights)—and there can be no such thing as "an *economic* bill of rights." But observe that the advocates of the latter have all but destroyed the former.

Remember that rights are moral principles which define and protect a man's freedom of action, but impose no obligations on other men. Private citizens are not a threat to one another's rights or freedom. A private citizen who resorts to physical force and violates the rights of others is a criminal—and men have legal protection against him.

Criminals are a small minority in any age or country. And the harm they have done to mankind is infinitesimal when compared to the horrors—the bloodshed, the wars, the persecutions, the confiscations, the famines, the enslavements, the wholesale destructions—perpetrated by mankind's governments. Potentially, a government is the most dangerous threat to man's rights: it holds a legal monopoly on the use of physical force against legally disarmed victims. When unlimited and unrestricted by individual rights, a government is men's deadliest enemy. It is not as protection against *private* actions, but against governmental actions that the Bill of Rights was written.

Now observe the process by which that protection is being destroyed.

The process consists of ascribing to private citizens the specific violations constitutionally forbidden to the government (which private citizens have no power to commit) and thus freeing the government from all restrictions. The switch is becoming progressively more obvious in the field of free speech. For years, the col-

lectivists have been propagating the notion that a private individual's refusal to finance an opponent is a violation of the opponent's right of free speech and an act of "censorship."

It is "censorship," they claim, if a newspaper refuses to employ or publish writers whose ideas are diametrically opposed to its policy.

It is "censorship," they claim, if businessmen refuse to advertise in a magazine that denounces, insults and smears them.

It is "censorship," they claim, if a TV sponsor objects to some outrage perpetrated on a program he is financing—such as the incident of Alger Hiss being invited to denounce former Vice-President Nixon.

And then there is Newton N. Minow who declares: "There is censorship by ratings, by advertisers, by networks, by affiliates which reject programming offered to their areas." It is the same Mr. Minow who threatens to revoke the license of any station that does not comply with his views on programming—and who claims that *that* is not censorship.

Consider the implications of such a trend.

"Censorship" is a term pertaining only to governmental action. No private action is censorship. No private individual or agency can silence a man or suppress a publication; only the government can do so. The freedom of speech of private individuals includes the right not to agree, not to listen and not to finance one's own antagonists.

But according to such doctrines as the "economic bill of rights," an individual has no right to dispose of his own material means by the guidance of his own convictions—and must hand over his money indiscriminately to

any speakers or propagandists, who have a "right" to his property.

This means that the ability to provide the material tools for the expression of ideas deprives a man of the right to hold any ideas. It means that a publisher has to publish books he considers worthless, false or evil—that a TV sponsor has to finance commentators who choose to affront his convictions—that the owner of a newspaper must turn his editorial pages over to any young hooligan who clamors for the enslavement of the press. It means that one group of men acquires the "right" to unlimited license—while another group is reduced to helpless irresponsibility.

But since it is obviously impossible to provide every claimant with a job, a microphone or a newspaper column, *who* will determine the "distribution" of "economic rights" and select the recipients, when the owners' right to choose has been abolished? Well, Mr. Minow has indicated *that* quite clearly.

And if you make the mistake of thinking that this applies only to big property owners, you had better realize that the theory of "economic rights" includes the "right" of every would-be playwright, every beatnik poet, every noise-composer and every nonobjective artist (who have political pull) to the financial support you did not give them when you did not attend their shows. What else is the meaning of the project to spend your tax money on subsidized art?

And while people are clamoring about "economic rights," the concept of political rights is vanishing. It is forgotten that the right of free speech means the freedom to advocate one's views and to bear the possible consequences, including disagreement with others, oppo-

sition, unpopularity and lack of support. The political function of "the right of free speech" is to protect dissenters and unpopular minorities from forcible suppression—*not* to guarantee them the support, advantages and rewards of a popularity they have not gained.

The Bill of Rights reads: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." It does not demand that private citizens provide a microphone for the man who advocates their destruction, or a passkey for the burglar who seeks to rob them, or a knife for the murderer who wants to cut their throats.

Such is the state of one of today's most crucial issues: *political* rights versus *"economic* rights." It's either-or. One destroys the other. But there are, in fact, no "economic rights," no "collective rights," no "public-interest rights." The term "individual rights" is a redundancy: there is no other kind of rights and no one else to possess them.

Those who advocate *laissez-faire* capitalism are the only advocates of man's rights.

(APRIL 1963)

Appendix E - Essay: Collectivized "Rights"

COLLECTIVIZED "RIGHTS"

BY AYN RAND

Rights are a moral principle defining proper social relationships. Just as a man needs a moral code in order to survive (in order to act, to choose the right goals and to achieve them), so a society (a group of men) needs moral principles in order to organize a social system consonant with man's nature and with the requirements of his survival.

Just as a man *can* evade reality and act on the blind whim of any given moment, but can achieve nothing save progressive self-destruction—so a society *can* evade reality and establish a system ruled by the blind whims of its members or its leader, by the majority gang of any given moment, by the current demagogue or by a permanent dictator. But such a society can achieve nothing save the rule of brute force and a state of progressive self-destruction.

What subjectivism is in the realm of ethics, collectivism is in the realm of politics. Just as the notion that

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"Anything I do is right because *I* chose to do it," is not a moral principle, but a negation of morality—so the notion that "Anything society does is right because *society* chose to do it," is not a moral principle, but a negation of moral principles and the banishment of morality from social issues.

When *"might"* is opposed to *"right,"* the concept of "might" can have only one meaning: the power of brute, physical force—which, in fact, is not a "power" but the most hopeless state of impotence; it is merely the "power" to destroy; it is the "power" of a stampede of animals running amuck.

Yet *that* is the goal of most of today's intellectuals. At the root of all their conceptual switches, there lies another, more fundamental one: the switch of the concept of rights from the individual to the collective—which means: the replacement of "The Rights of Man" by "The Rights of Mob."

Since only an individual man can possess rights, the expression "individual rights" is a redundancy (which one has to use for purposes of clarification in today's intellectual chaos). But the expression "collective rights" is a contradiction in terms.

Any group or "collective," large or small, is only a number of individuals. A group can have no rights other than the rights of its individual members. In a free society, the "rights" of any group are derived from the rights of its members through their voluntary, individual choice and *contractual* agreement, and are merely the application of these individual rights to a specific undertaking. Every legitimate group undertaking is based on the participants' right of free association and free trade. (By "legitimate," I mean: noncriminal and freely

formed, that is, a group which no one was *forced* to join.)

For instance, the right of an industrial concern to engage in business is derived from the right of its owners to invest their money in a productive venture—from their right to hire employees—from the right of the employees to sell their services—from the right of all those involved to produce and to sell their products—from the right of the customers to buy (or not to buy) those products. Every link of this complex chain of contractual relationships rests on individual rights, individual choices, individual agreements. Every agreement is delimited, specified and subject to certain conditions, that is, dependent upon a mutual trade to mutual benefit.

This is true of all legitimate groups or associations in a free society: partnerships, business concerns, professional associations, labor unions (*voluntary* ones), political parties, etc. It applies also to all agency agreements: the right of one man to act for or represent another or others is derived from the rights of those he represents and is delegated to him by their voluntary choice, for a specific, delimited purpose—as in the case of a lawyer, a business representative, a labor union delegate, etc.

A group, as such, has no rights. A man can neither acquire new rights by joining a group nor lose the rights which he does possess. The principle of individual rights is the only moral base of all groups or associations.

Any group that does not recognize this principle is not an association, but a gang or a mob.

Any doctrine of group activities that does not recognize individual rights is a doctrine of mob rule or legalized lynching.

The notion of "collective rights" (the notion that rights

belong to groups, not to individuals) means that "rights" belong to some men, but not to others—that some men have the "right" to dispose of others in any manner they please—and that the criterion of such privileged position consists of numerical superiority.

Nothing can ever justify or validate such a doctrine—and no one ever has. Like the altruist morality from which it is derived, this doctrine rests on mysticism: either on the old-fashioned mysticism of faith in supernatural edicts, like "The Divine Right of Kings"—or on the social mystique of modern collectivists who see society as a super-organism, as some supernatural entity apart from and superior to the sum of its individual members.

The amorality of that collectivist mystique is particularly obvious today in the issue of *national* rights.

A nation, like any other group, is only a number of individuals and can have no rights other than the rights of its individual citizens. A free nation—a nation that recognizes, respects and protects the individual rights of its citizens—has a right to its territorial integrity, its social system and its form of government. The government of such a nation is not the ruler, but the servant or *agent* of its citizens and has no rights other than the rights *delegated* to it by the citizens for a specific, delimited task (the task of protecting them from physical force, derived from their right of self-defense).

The citizens of a free nation may disagree about the specific legal procedures or *methods* of implementing their rights (which is a complex problem, the province of political science and of the philosophy of law), but they agree on the basic principle to be implemented: the principle of individual rights. When a country's consti-

tution places individual rights outside the reach of public authorities, the sphere of political power is severely delimited—and thus the citizens may, safely and properly, agree to abide by the decisions of a majority vote in this delimited sphere. The lives and property of minorities or dissenters are not at stake, are not subject to vote and are not endangered by any majority decision; no man or group holds a blank check on power over others.

Such a nation has a right to its sovereignty (derived from the rights of its citizens) and a right to demand that its sovereignty be respected by all other nations.

But this right cannot be claimed by dictatorships, by savage tribes or by any form of absolutist tyranny. A nation that violates the rights of its own citizens cannot claim any rights whatsoever. In the issue of rights, as in all moral issues, there can be no double standard. A nation ruled by brute physical force is not a nation, but a horde—whether it is led by Attila, Genghis Khan, Hitler, Khrushchev or Castro. What rights could Attila claim and on what grounds?

This applies to all forms of tribal savagery, ancient or modern, primitive or "industrialized." Neither geography nor race nor tradition nor previous state of development can confer on some human beings the "right" to violate the rights of others.

The right of "the self-determination of nations" applies only to free societies or to societies seeking to establish freedom; it does not apply to dictatorships. Just as an individual's right of free action does not include the "right" to commit crimes (that is, to violate the rights of others), so the right of a nation to determine its own form of government does not include the right to establish a slave society (that is, to legalize the enslavement of

some men by others). *There is no such thing as "the right to enslave."* A nation *can* do it, just as a man *can* become a criminal—but neither can do it *by right.*

It does not matter, in this context, whether a nation was enslaved by force, like Soviet Russia, or by vote, like Nazi Germany. Individual rights are not subject to a public vote; a majority has no right to vote away the rights of a minority; the political function of rights is precisely to protect minorities from oppression by majorities (and the smallest minority on earth is the individual). Whether a slave society was conquered or *chose* to be enslaved, it can claim no national rights and no recognition of such "rights" by civilized countries—just as a mob of gangsters cannot demand a recognition of its "rights" and a legal equality with an industrial concern or a university, on the ground that the gangsters *chose* by unanimous vote to engage in that particular kind of group activity.

Dictatorship nations are outlaws. Any free nation had the *right* to invade Nazi Germany and, today, has the *right* to invade Soviet Russia, Cuba or any other slave pen. Whether a free nation chooses to do so or not is a matter of its own self-interest, *not* of respect for the nonexistent "rights" of gang rulers. It is not a free nation's *duty* to liberate other nations at the price of self-sacrifice, but a free nation has the right to do it, when and if it so chooses.

This right, however, is conditional. Just as the suppression of crimes does not give a policeman the right to engage in criminal activities, so the invasion and destruction of a dictatorship does not give the invader the right to establish another variant of a slave society in the conquered country.

Appendix E - Essay: Collectivized "Rights"

A slave country has no *national* rights, but the *individual* rights of its citizens remain valid, even if unrecognized, and the conqueror has no right to violate them. Therefore, the invasion of an enslaved country is morally justified only when and if the conquerors establish a *free* social system, that is, a system based on the recognition of individual rights.

Since there is no fully free country today, since the so-called "Free World" consists of various "mixed economies," it might be asked whether every country on earth is morally open to invasion by every other. The answer is: No. There is a difference between a country that recognizes the principle of individual rights, but does not implement it fully in practice, and a country that denies and flouts it explicitly. All "mixed economies" are in a precarious state of transition which, ultimately, has to turn to freedom or collapse into dictatorship. There are four characteristics which brand a country unmistakably as a dictatorship: one-party rule—executions without trial or with a mock trial, for political offenses—the nationalization or expropriation of private property—and censorship. A country guilty of these outrages forfeits any moral prerogatives, any claim to national rights or sovereignty, and becomes an outlaw.

Observe, on this particular issue, the shameful end-of-trail and the intellectual disintegration of modern "liberals."

Internationalism had always been one of the "liberals' " basic tenets. They regarded nationalism as a major social evil, as a product of capitalism and as the cause of wars. They opposed any form of national self-interest; they refused to differentiate between rational patriotism

and blind, racist chauvinism, denouncing both as "fascist." They advocated the dissolution of national boundaries and the merging of all nations into "One World." Next to property rights, "national rights" were the special target of their attacks.

Today, it is "national rights" that they invoke as their last, feeble, fading hold on some sort of moral justification for the results of their theories—for the brood of little statist dictatorships spreading, like a skin disease, over the surface of the globe, in the form of so-called "newly emerging nations," semi-socialist, semi-communist, semi-fascist, and wholly committed only to the use of brute force.

It is the "national right" of such countries to choose their own form of government (any form they please) that the "liberals" offer as a moral validation and ask us to respect. It is the "national right" of Cuba to *its* form of government, they claim, that we must not violate or interfere with. Having all but destroyed the legitimate national rights of free countries, it is for dictatorships that the "liberals" now claim the sanction of "national rights."

And worse: it is not mere nationalism that the "liberals" champion, but *racism*—primordial tribal racism.

Observe the double standard: while, in the civilized countries of the West, the "liberals" are still advocating internationalism and global self-sacrifice—the savage tribes of Asia and Africa are granted the sovereign "right" to slaughter one another in racial warfare. Mankind is reverting to a preindustrial, prehistorical view of society: to racial collectivism.

Such is the logical result and climax of the "liberals'" moral collapse which began when, as a prelude to the

collectivization of property, they accepted the collectivization of rights.

Their own confession of guilt lies in their terminology. Why do they use the word *"rights"* to denote the things they are advocating? Why don't they preach what they practice? Why don't they name it openly and attempt to justify it, if they can?

The answer is obvious.

(JUNE 1963)

Appendix F - Essay: The Nature of Government

THE NATURE OF GOVERNMENT

BY AYN RAND

A government is an institution that holds the exclusive power to *enforce* certain rules of social conduct in a given geographical area.

Do men need such an institution—and why?

Since man's mind is his basic tool of survival, his means of gaining knowledge to guide his actions—the basic condition he requires is the freedom to think and to act according to his rational judgment. This does not mean that a man must live alone and that a desert island is the environment best suited to his needs. Men can derive enormous benefits from dealing with one another. A social environment is most conducive to their successful survival—*but only on certain conditions.*

"The two great values to be gained from social existence are: knowledge and trade. Man is the only species that can transmit and expand his store of knowledge from generation to generation; the knowledge potentially available to man is greater than any one man could

begin to acquire in his own lifespan; every man gains an incalculable benefit from the knowledge discovered by others. The second great benefit is the division of labor: it enables a man to devote his effort to a particular field of work and to trade with others who specialize in other fields. This form of cooperation allows all men who take part in it to achieve a greater knowledge, skill and productive return on their effort than they could achieve if each had to produce everything he needs, on a desert island or on a self-sustaining farm.

"But these very benefits indicate, delimit and define what kind of men can be of value to one another and in what kind of society: only rational, productive, independent men in a rational, productive, free society." ("The Objectivist Ethics.")

A society that robs an individual of the product of his effort, or enslaves him, or attempts to limit the freedom of his mind, or compels him to act against his own rational judgment—a society that sets up a conflict between its edicts and the requirements of man's nature—is not, strictly speaking, a society, but a mob held together by institutionalized gang-rule. Such a society destroys all the values of human coexistence, has no possible justification and represents, not a source of benefits, but the deadliest threat to man's survival. Life on a desert island is safer than and incomparably preferable to existence in Soviet Russia or Nazi Germany.

If men are to live together in a peaceful, productive, rational society and deal with one another to mutual benefit, they must accept the basic social principle without which no moral or civilized society is possible: the principle of individual rights. (See Chapters 12 and 13.)

To recognize individual rights means to recognize and

accept the conditions required by man's nature for his proper survival.

Man's rights can be violated only by the use of physical force. It is only by means of physical force that one man can deprive another of his life, or enslave him, or rob him, or prevent him from pursuing his own goals, or compel him to act against his own rational judgment.

The precondition of a civilized society is the barring of physical force from social relationships—thus establishing the principle that if men wish to deal with one another, they may do so only by means of *reason:* by discussion, persuasion and voluntary, uncoerced agreement.

The necessary consequence of man's right to life is his right to self-defense. In a civilized society, force may be used only in retaliation and only against those who initiate its use. All the reasons which make the initiation of physical force an evil, make the retaliatory use of physical force a moral imperative.

If some "pacifist" society renounced the retaliatory use of force, it would be left helplessly at the mercy of the first thug who decided to be immoral. Such a society would achieve the opposite of its intention: instead of abolishing evil, it would encourage and reward it.

If a society provided no organized protection against force, it would compel every citizen to go about armed, to turn his home into a fortress, to shoot any strangers approaching his door—or to join a protective gang of citizens who would fight other gangs, formed for the same purpose, and thus bring about the degeneration of that society into the chaos of gang-rule, i.e., rule by brute force, into the perpetual tribal warfare of prehistorical savages.

The use of physical force—even its retaliatory use—

cannot be left at the discretion of individual citizens. Peaceful coexistence is impossible if a man has to live under the constant threat of force to be unleashed against him by any of his neighbors at any moment. Whether his neighbors' intentions are good or bad, whether their judgment is rational or irrational, whether they are motivated by a sense of justice or by ignorance or by prejudice or by malice—the use of force against one man cannot be left to the arbitrary decision of another.

Visualize, for example, what would happen if a man missed his wallet, concluded that he had been robbed, broke into every house in the neighborhood to search it, and shot the first man who gave him a dirty look, taking the look to be a proof of guilt.

The retaliatory use of force requires *objective* rules of evidence to establish that a crime has been committed and to *prove* who committed it, as well as *objective* rules to define punishments and enforcement procedures. Men who attempt to prosecute crimes, without such rules, are a lynch mob. If a society left the retaliatory use of force in the hands of individual citizens, it would degenerate into mob rule, lynch law and an endless series of bloody private feuds or vendettas.

If physical force is to be barred from social relationships, men need an institution charged with the task of protecting their rights under an *objective* code of rules.

This is the task of a government—of a *proper* government—its basic task, its only moral justification and the reason why men do need a government.

A government is the means of placing the retaliatory use of physical force under objective control—i.e., under objectively defined laws.

Appendix F - Essay: The Nature of Government

The fundamental difference between private action and governmental action—a difference thoroughly ignored and evaded today—lies in the fact that a government holds a monopoly on the legal use of physical force. It has to hold such a monopoly, since it is the agent of restraining and combating the use of force; and for that very same reason, its actions have to be rigidly defined, delimited and circumscribed; no touch of whim or caprice should be permitted in its performance; it should be an impersonal robot, with the laws as its only motive power. If a society is to be free, its government has to be controlled.

Under a proper social system, a private individual is legally free to take any action he pleases (so long as he does not violate the rights of others), while a government official is bound by law in his every official act. A private individual may do anything except that which is legally *forbidden;* a government official may do nothing except that which is legally *permitted.*

This is the means of subordinating "might" to "right." This is the American concept of "a government of laws and not of men."

The nature of the laws proper to a free society and the source of its government's authority are both to be derived from the nature and purpose of a proper government. The basic principle of both is indicated in The Declaration of Independence: "to secure these [individual] rights, governments are instituted among men, deriving their just powers from the consent of the governed . . ."

Since the protection of individual rights is the only proper purpose of a government, it is the only proper subject of legislation: all laws must be based on indi-

vidual rights and aimed at their protection. All laws must be *objective* (and objectively justifiable): men must know clearly, and in advance of taking an action, what the law forbids them to do (and why), what constitutes a crime and what penalty they will incur if they commit it.

The source of the government's authority is "the consent of the governed." This means that the government is not the *ruler,* but the servant or *agent* of the citizens; it means that the government as such has no rights except the rights *delegated* to it by the citizens for a specific purpose.

There is only one basic principle to which an individual must consent if he wishes to live in a free, civilized society: the principle of renouncing the use of physical force and delegating to the government his right of physical self-defense, for the purpose of an orderly, objective, legally defined enforcement. Or, to put it another way, he must accept *the separation of force and whim* (any whim, including his own).

Now what happens in case of a disagreement between two men about an undertaking in which both are involved?

In a free society, men are not forced to deal with one another. They do so only by voluntary agreement and, when a time element is involved, by *contract.* If a contract is broken by the arbitrary decision of one man, it may cause a disastrous financial injury to the other—and the victim would have no recourse except to seize the offender's property as compensation. But here again, the use of force cannot be left to the decision of private individuals. And this leads to one of the most important and most complex functions of the government: to the func-

tion of an arbiter who settles disputes among men according to objective laws.

Criminals are a small minority in any semicivilized society. But the protection and enforcement of contracts through courts of civil law is the most crucial need of a peaceful society; without such protection, no civilization could be developed or maintained.

Man cannot survive, as animals do, by acting on the range of the immediate moment. Man has to project his goals and achieve them across a span of time; he has to calculate his actions and plan his life long-range. The better a man's mind and the greater his knowledge, the longer the range of his planning. The higher or more complex a civilization, the longer the range of activity it requires—and, therefore, the longer the range of contractual agreements among men, and the more urgent their need of protection for the security of such agreements.

Even a primitive barter society could not function if a man agreed to trade a bushel of potatoes for a basket of eggs and, having received the eggs, refused to deliver the potatoes. Visualize what this sort of whim-directed action would mean in an industrial society where men deliver a billion dollars' worth of goods on credit, or contract to build multimillion-dollar structures, or sign ninety-nine-year leases.

A unilateral breach of contract involves an indirect use of physical force: it consists, in essence, of one man receiving the material values, goods or services of another, then refusing to pay for them and thus keeping them by force (by mere physical possession), not by right—i.e., keeping them without the consent of their owner. Fraud involves a similarly indirect use of force: it consists of

obtaining material values without their owner's consent, under false pretenses or false promises. Extortion is another variant of an indirect use of force: it consists of obtaining material values, not in exchange for values, but by the threat of force, violence or injury.

Some of these actions are obviously criminal. Others, such as a unilateral breach of contract, may not be criminally motivated, but may be caused by irresponsibility and irrationality. Still others may be complex issues with some claim to justice on both sides. But whatever the case may be, all such issues have to be made subject to objectively defined laws and have to be resolved by an impartial arbiter, administering the laws, i.e., by a judge (and a jury, when appropriate).

Observe the basic principle governing justice in all these cases: it is the principle that no man may obtain any values from others without the owners' consent—and, as a corollary, that a man's rights may not be left at the mercy of the unilateral decision, the arbitrary choice, the irrationality, *the whim* of another man.

Such, in essence, is the proper purpose of a government: to make social existence possible to men, by protecting the benefits and combating the evils which men can cause to one another.

The proper functions of a government fall into three broad categories, all of them involving the issues of physical force and the protection of men's rights: *the police,* to protect men from criminals—*the armed services,* to protect men from foreign invaders—*the law courts,* to settle disputes among men according to objective laws.

These three categories involve many corollary and derivative issues—and their implementation in practice, in the form of specific legislation, is enormously complex.

It belongs to the field of a special science: the philosophy of law. Many errors and many disagreements are possible in the field of implementation, but what is essential here is the principle to be implemented: the principle that the purpose of law and of government is the protection of individual rights.

Today, this principle is forgotten, ignored and evaded. The result is the present state of the world, with mankind's retrogression to the lawlessness of absolutist tyranny, to the primitive savagery of rule by brute force.

In unthinking protest against this trend, some people are raising the question of whether government as such is evil by nature and whether anarchy is the ideal social system. Anarchy, as a political concept, is a naive floating abstraction: for all the reasons discussed above, a society without an organized government would be at the mercy of the first criminal who came along and who would precipitate it into the chaos of gang warfare. But the possibility of human immorality is not the only objection to anarchy: even a society whose every member were fully rational and faultlessly moral, could not function in a state of anarchy; it is the need of *objective* laws and of an arbiter for honest disagreements among men that necessitates the establishment of a government.

A recent variant of anarchistic theory, which is befuddling some of the younger advocates of freedom, is a weird absurdity called "competing governments." Accepting the basic premise of the modern statists—who see no difference between the functions of government and the functions of industry, between force and production, and who advocate government ownership of business—the proponents of "competing governments" take the other side of the same coin and declare that since compe-

tition is so beneficial to business, it should also be applied to government. Instead of a single, monopolistic government, they declare, there should be a number of different governments in the same geographical area, competing for the allegiance of individual citizens, with every citizen free to "shop" and to patronize whatever government he chooses.

Remember that forcible restraint of men is the only service a government has to offer. Ask yourself what a competition in forcible restraint would have to mean.

One cannot call this theory a contradiction in terms, since it is obviously devoid of any understanding of the terms "competition" and "government." Nor can one call it a floating abstraction, since it is devoid of any contact with or reference to reality and cannot be concretized at all, not even roughly or approximately. One illustration will be sufficient: suppose Mr. Smith, a customer of Government A, suspects that his next-door neighbor, Mr. Jones, a customer of Government B, has robbed him; a squad of Police A proceeds to Mr. Jones' house and is met at the door by a squad of Police B, who declare that they do not accept the validity of Mr. Smith's complaint and do not recognize the authority of Government A. What happens then? You take it from there.

The evolution of the concept of "government" has had a long, tortuous history. Some glimmer of the government's proper function seems to have existed in every organized society, manifesting itself in such phenomena as the recognition of some implicit (if often nonexistent) difference between a government and a robber gang—the aura of respect and of moral authority granted to the government as the guardian of "law and

order"—the fact that even the most evil types of government found it necessary to maintain some semblance of order and some pretense at justice, if only by routine and tradition, and to claim some sort of moral justification for their power, of a mystical or social nature. Just as the absolute monarchs of France had to invoke "The Divine Right of Kings," so the modern dictators of Soviet Russia have to spend fortunes on propaganda to justify their rule in the eyes of their enslaved subjects.

In mankind's history, the understanding of the government's proper function is a very recent achievement: it is only two hundred years old and it dates from the Founding Fathers of the American Revolution. Not only did they identify the nature and the needs of a free society, but they devised the means to translate it into practice. A free society—like any other human product—cannot be achieved by random means, by mere wishing or by the leaders' "good intentions." A complex legal system, based on *objectively* valid principles, is required to make a society free and *to keep it free*—a system that does not depend on the motives, the moral character or the intentions of any given official, a system that leaves no opportunity, no legal loophole for the development of tyranny.

The American system of checks and balances was just such an achievement. And although certain contradictions in the Constitution did leave a loophole for the growth of statism, the incomparable achievement was the concept of a constitution as a means of limiting and restricting the power of the government.

Today, when a concerted effort is made to obliterate this point, it cannot be repeated too often that the Constitution is a limitation on the government, not on pri-

vate individuals—that it does not prescribe the conduct of private individuals, only the conduct of the government—that it is not a charter *for* government power, but a charter of the citizens' protection *against* the government.

Now consider the extent of the moral and political inversion in today's prevalent view of government. Instead of being a protector of man's rights, the government is becoming their most dangerous violator; instead of guarding freedom, the government is establishing slavery; instead of protecting men from the initiators of physical force, the government is initiating physical force and coercion in any manner and issue it pleases; instead of serving as the instrument of *objectivity* in human relationships, the government is creating a deadly, subterranean reign of uncertainty and fear, by means of nonobjective laws whose interpretation is left to the arbitrary decisions of random bureaucrats; instead of protecting men from injury by whim, the government is arrogating to itself the power of unlimited whim—so that we are fast approaching the stage of the ultimate inversion: the stage where the government is *free* to do anything it pleases, while the citizens may act only by *permission;* which is the stage of the darkest periods of human history, the stage of rule by brute force.

It has often been remarked that in spite of its material progress, mankind has not achieved any comparable degree of moral progress. That remark is usually followed by some pessimistic conclusion about human nature. It is true that the moral state of mankind is disgracefully low. But if one considers the monstrous moral inversions of the governments (made possible by the altruist-collectivist morality) under which mankind has had to

live through most of its history, one begins to wonder how men have managed to preserve even a semblance of civilization, and what indestructible vestige of self-esteem has kept them walking upright on two feet.

One also begins to see more clearly the nature of the political principles that have to be accepted and advocated, as part of the battle for man's intellectual Renaissance.

(DECEMBER 1963)

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 965

HOWARD S. KATZ and DAVID A. BAUMANN,
PETITIONERS

v.

HONORABLE HAROLD R. TYLER, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. On February 21, 1966, petitioners commenced an action in the United States District Court for the Southern District of New York under 28 U.S.C. 1331 against the President of the United States, the Secretary of Defense and the Director of the Selective Service System, seeking injunctive relief and a judgment declaring the Universal Military Training and Service Act (50 U.S.C. App. 451-473) to be unconstitutional under the Ninth Amendment to the

United States Constitution and Article Eight of the Charter of the International Military Tribunal, 59 Stat. 1546 ("the Nuremberg charter").

At the time the suit was instituted, petitioner Baumann had received his notice of induction into the armed forces, but had not yet been inducted. A few days afterwards, Baumann was inducted into the army. Petitioner Katz had enlisted in the Rhode Island National Guard following receipt of an induction notice and had served on active duty for a year. He was then reclassified 1-D by his selective service board. On April 18, 1966, he was released from the Rhode Island National Guard and placed on the rolls of the United States Army Reserve. The six-year service obligation resulting from his enlistment in the National Guard will terminate on October 10, 1969.

The district court held that Katz did not have the necessary standing to sue. As to Baumann, the court ruled that, in view of his induction and the availability of habeas corpus, a declaratory judgment and an injunction were no longer appropriate remedies (Pet. 5a-7a). The court further held that petitioners' contentions did not raise substantial questions relating to the validity of the statute. The court therefore denied petitioners' motion to convene a three-judge district court and granted the motion of defendants to dismiss the complaint (Pet. 11a). An application to the court of appeals for a writ of mandamus to compel the convening of a three-judge court was denied without opinion on October 19, 1966 (Pet. 13a).

2. Laying to one side the questions whether petitioners had standing to sue and whether mandamus in the court of appeals was the proper remedy, it is entirely clear, we submit, that petitioners' attack on the Universal Military Training and Service Act presented no question sufficiently substantial to warrant the convening of a three-judge court. See, *e.g.*, *Ex Parte Poresky*, 290 U.S. 30; *Bailey* v. *Patterson*, 369 U.S. 31. To be sure, no court has considered the validity of the Act under the Ninth Amendment, but it is plain that the Amendment has no bearing on the Act. The Ninth Amendment reserves to "the people" only *unenumerated* rights (see *Griswold* v. *Connecticut*, 381 U.S. 479, 492 (concurring opinion)). The power of Congress to enact a law providing for conscription in this country has often been upheld under Article I, Section 8 of the Constitution as a valid exercise of the authority to "raise and support armies." *Selective Draft Law Cases*, 245 U.S. 366; *United States* v. *Williams*, 302 U.S. 46; *Lichter* v. *United States*, 334 U.S. 742, 756 (dictum); *Etcheverry* v. *United States*, 320 F. 2d 873 (C.A. 9), certiorari denied, 375 U.S. 930; *United States* v. *Henderson*, 180 F. 2d 711 (C.A. 7), certiorari denied, 339 U.S. 963; *United States* v. *Mitchell*, 246 F. Supp. 874 (D. Conn.).

Petitioners' reliance upon the Eighth Article of the Nuremberg Charter is also misplaced. That Charter was designed to implement an "agreement" between the United States, France, the United Kingdom, and the Soviet Union respecting "the prosecution and punishment of the major war criminals of the Euro-

pean Axis." 59 Stat. 1544. It established an International Military Tribunal which was given jurisdiction over "persons who, acting in the interests of the European Axis countries * * * committed any of the following crimes * * * (a) crimes against peace * * * (b) war crimes * * * (c) crimes against humanity * * *." 59 Stat. 1546-7. Article Eight provides (59 Stat. 1548):

> The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Petitioners are not charged with having committed any of the above-enumerated crimes. The Nuremberg Charter therefore has no application to the present action.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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STATEMENT

To add to the confusion engendered by the Second Circuit's cryptic disposition of this case, we now have the government's opposition to the granting of this Petition which lays "to one side the questions whether petitioners had standing to sue and whether mandamus in the Court of Appeals was the proper remedy." After laying them to one side, unfortunately the government never returns to deal with them. It would thus appear

that the government has no desire to discuss two of the three questions raised by this Petition, questions which we have made clear are of tremendous import in the area of federal practice and procedure. Perhaps, by its unwillingness to discuss these questions, the government is conceding that as to them, certiorari should be granted. At the very least, it has conceded that it considers only the substantiality issue "entirely clear."

THE NINTH AMENDMENT

The government also concedes that "no court has considered the validity of the Act under the Ninth Amendment." Once having done this, the government's only way out is to assert (not argue) that the Ninth Amendment "has no bearing on the Act."

An Amendment of the Constitution "has bearing" on a congressional Act if and to the extent that the right or rights protected by that Amendment are infringed upon by the Act. What does it mean to argue that the Ninth Amendment has no bearing on the Universal Military Training and Service Act? It means the government is contending that a man's right to life and liberty are not being infringed upon when he is forcibly taken from his home, his loved ones and his private pursuits, forcibly detained, forcibly disciplined, forcibly made to eat what is provided or starve, forcibly made to wear what he is given, forcibly trained as a killer, forcibly transported all over the country or overseas, forcibly put under fire, forcibly ordered to kill or be killed, and often forcibly required to become a martyr on the battlefield.

The government argues that because Congress has a delegated power to "raise and support armies," and because the Ninth Amendment reserves only unenumerated rights to the people, the reserved rights must yield to the delegated power. What is wrong with the government's argument is that conscription is not the delegated power — only the authority to raise armies is. And there is no conflict per se between that authority and the rights protected by the Ninth. The fact that conscription was once (and only once) upheld "as a valid exercise" of that authority (p. 3 of the government's brief) does not transform that exercise into a delegated power. And the government concedes that the validity of this "exercise," this method of implementation, has never been considered under the Ninth Amendment—until now.

What the government seems to be implying is: given a specific delegated power, Congress can do anything it likes, trample on any rights it chooses, to implement that power. If in "supporting" armies Congress passed a law infringing on free speech, the courts would not be denying the power to support armies by striking down that law as violative of the First Amendment. If in "establishing" post offices, Congress passed a law instituting forced labor, the courts would not be denying the post-office power by striking down that law as violative of the Ninth Amendment, or any other. What is the difference between such cases and the instant one?

Given a legitimate function of Congress, a proper delegated power, is there to be no limitation on how Congress conducts those functions and implements those powers? Given a valid

end, are nefarious means to be permitted and condoned? If the Ninth Amendment reserves fundamental rights — among them life and liberty — which were never delegated away, shall Congress be allowed to invade them indirectly, under the guise of "implementing" a delegated power? It is these profound questions — questions touching the vitals of our political structure — that, via the conscription issue, this Petition seeks to have the Court answer.

Heretofore, we have argued that the Act has only been challenged in this Court once before in the Selective Draft Law Cases of 1918. The government has agreed, except to the extent that it says United States v. Williams, 302; U.S. 46, also challenged the Act. However, Williams involved a claim for a deceased enlistee's insurance. A dictum that conscription was constitutionally permissible cited back to the Selective Draft Law Cases. This hardly justifies the government's characterization that this Court has "often" upheld conscription.

Heretofore, we have argued that the Act was never challenged by either the Ninth Amendment, or the Nuremberg Charter. To this, the government also agrees.

Therefore, in this case's challenge to conscription we have a brand new question — a question which affects so many Americans in such a serious personal way that further argument on the point is unnecessary.

If the government's opposition here has done anything, it has further demonstrated why this Petition should be granted.

THE NUREMBERG CHARTER

The government has sought to swiftly dispose of petitioners' Nuremberg argument by simply observing that there are three kinds of war crimes, and that we have not tried to show that the United States is committing any of them, or that it has commanded any of its citizens to do so — thereby completely missing the whole point of our contention.

This attitude is a prime example of being "concrete bound" — of losing sight of the principle involved. It could be argued persuasively that it constitutes a "crime against humanity" for a country to force its male citizens to fight and die against their will — but this argument, too, would not reach the core of why conscription violates the Nuremberg Charter.

As we have shown, the principle here is that the mere existence of the Charter and the Draft together create a situation of "damned if you do, and damned if you don't" — a situation where a young American who "chooses" the Army over jail is impaled on the horns of a dilemma, not necessarily by what the Army is ordering him to do now, but by what he may be ordered to do at any time. He can not disobey any Army orders without going to jail or being shot; he is forced to act pursuant to the orders of superior officers, whatever those orders might be. And the Charter provides that if he does commit "war crimes," the fact that he was ordered to is no defense.

It is this issue that the government evades

when it argues that the Charter has no application to the conscription issue.

Many young Americans are today asking themselves whether to evade compulsory military service and go to jail, or to enter military service where, upon being given orders to do something wrong, either they disobey orders and go to jail or get shot, or do the act and perhaps later be told that the fact they acted under orders was no defense.

This Court must answer this question for these young men. It can no longer allow American youths to be "damned if they do, and damned if they don't."

Certiorari should be granted.

Respectfully submitted,

Henry Mark Holzer
Phyllis Tate Holzer
Lawyers for Petitioners

[2/67]